No. 91-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

In reviewing an adjudication conducted under an agency rule made final by a court of appeals in another circuit, recognized as settled by the reviewing circuit and relied on by all parties, including the agency, can the reviewing court *sua sponte* rewrite the rule in direct conflict with the rule previously made final, decide the case based on its own rule, and affirm the agency on a ground never advanced by the agency or argued by any of the hundreds of parties before the agency?

PARTIES TO THE PROCEEDING

The parties to the proceeding before the United States Court of Appeals for the District of Columbia Circuit were those in the caption, and, as intervenors: American Trading and Production Corporation, Amoco Production Company, Arco Oil and Gas Company, Bass Enterprises Production Company, Cabot Petroleum Corp., Champlin Exploration, Inc., Chevron U.S.A., Inc.; Conoco, Inc., Damson Oil Corporation, Eason Drilling Company and Sonat Exploration Co., Fina Oil and Chemical Company, Grace Petroleum, Inc., Graham-Michaelis Corporation, H.C. Federer, Philcon Development Co. and Sidwell Oil & Gas, Inc., J. Burns Brown Operating Company, John H. Hendrix Corp. *et al.*, Kaiser-Francis Oil Company and Leben Oil Corporation, Kaneb Exploration, Inc., Kerr-McGee Corporation, Lester Wilkonson, Marathon Oil Company, Maxus Exploration Company, MAPCO, Inc., MAPCO Oil & Gas Company, Santa Fe Minerals (a Division of Santa Fe International Corporation), Santa Fe-Andover Oil Company, Santa Fe Braun, Inc., Werner Oil, Inc., CNG Producing Company and Russell Freeman, Mesa Operating Limited Partnership d/b/a/ Continental Energy, Mobil Natural Gas, Inc., Mobil Producing Texas and New Mexico, Inc., and Mobil Oil Exploration and Producing Southeast, Inc., Neleh Gas & Oil Corp., Northern Natural Gas Company, a division of ENRON Corp., Okmar Oil Company, Petroleum, Inc., Phillips Petroleum Company and Phillips Natural Gas Co., Robert F. White, Robert L. Williams, Shell Western E&P, Inc., Shenandoah Oil Corporation, Tex/Con Oil & Gas Company and Lear Petroleum Corp., Texaco Inc., and Texaco Producing, Inc., Texaco International Petroleum Co. & Phoenix

Resources Co., Trees Oil Company, Union Pacific Resources Co., Wayman W. Buchanan.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, South Dakota Public Utilities Commission, Minnesota Public Utilities Commission, and Peoples Natural Gas Company, a division of UtiliCorp United Inc., pray that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the proceedings below on May 24, 1991, and the opinion and orders denying rehearing and rehearing en banc on August 20, 1991.

OPINIONS BELOW

The opinion of the court of appeals (6-22a)[1] is reported at 934 F.2d 346. The opinion of the court of appeals on rehearing (3-5a) is reported at 941 F.2d 1233. The opinions of the Federal Energy Regulatory Commission are reported at 48 F.E.R.C. ¶ 61,177 and 50 F.E.R.C. ¶ 61,288 (23a-49a).

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 24, 1991, affirming orders of the Federal Energy Regulatory Commission, issued on August 2, 1989, *Northern Natural Gas Co.*, 48 F.E.R.C. ¶ 61,177 (order aff'g initial decision), and on March 9, 1990, *Northern Natural Gas Co.*, 50 F.E.R.C. ¶ 61,288 (order denying reh'g). The court of appeals denied timely petitions for rehearing and for rehearing en banc on August 20, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, §§ 717(r), 3311(b)(9), and 3416 of Title 15 of the United States Code and § 270.205 of Title 18 of the Code of Federal Regulations are set forth in the Appendix.

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[1] The various opinions below are reproduced in the Appendix to the Petition for Writ of Certiorari. Citations with an "a" refer to that Appendix. Materials not included in the Appendix but reproduced in the Joint Appendix filed in the Court of Appeals are referred to as "___ J.A. Vol. ___".

STATEMENT OF THE CASE

Pursuant to a rule set by the Federal Energy Regulatory Commission (FERC or Commission), the purpose of the lengthy adjudicatory proceeding below was to determine whether collection of natural gas ceiling prices set directly by Congress in the Natural Gas Policy Act of 1978 (NGPA) is authorized in over 1200 pre-NGPA contracts between Northern Natural Gas Company (Northern), a natural gas pipeline, and its numerous gas suppliers (producers). Hundreds of millions of dollars are at stake.

Following the 1978 enactment of the NGPA, the Commission initially suggested that "area rate clauses" in existing long term contracts between pipelines and producers did not authorize NGPA rates. These area rate clauses are pricing provisions that typically provide for escalation to Commission-set area rates and do not expressly provide for Congressionally-set prices. In its Order 23 rulemaking,[2] FERC deferred to certain producer and pipeline assertions that, without explicitly saying so in their contracts, they intended, *at the time of contracting* for their area rate clauses, to provide for Congressionally-set prices. The Commission established Order 23 procedures through which the contracting parties could assert

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[2] Order 23, F.E.R.C. Stats. & Regs. ¶ 30,040 (March 20, 1979) (final regulations); Order on Rehearing of Order 23, F.E.R.C. Stats. & Regs. ¶ 30,052 (May 8, 1979) (order extending time and clarifying); Order 23-A, F.E.R.C. Stats. & Regs. ¶ 30,058 (June 15, 1979) (general rules and definitions); Order 23-B, F.E.R.C. Stats. & Regs. ¶ 30,065 (July 3, 1979) (final regulations); and Order on Rehearing of Order 23-B, F.E.R.C. Stats. & Regs. ¶ 30,073 (August 17, 1979) (amendment and clarification).

their underlying intent had been to require NGPA prices. To the extent that the contracting parties had no such intent, the alternative procedure of contract amendment to provide for NGPA prices remained available.[3] The Order 23 procedures recognized that a pipeline's decision to pay NGPA prices could affect its customers, from whom it would seek to recover the higher prices. Accordingly, they provided for customer challenges to the contracting parties' claims and for evidentiary hearings at which the contracting parties would bear the burden of proof.

In 1981 the Commission's Orders were, "in the main" and as relevant here, upheld by the Fifth Circuit, *Pennzoil Co. v. FERC*, 645 F.2d 360, and upon the denial of certiorari became final, 454 U.S. 1142 (1982). In 1987 these rules were recognized as "settled" by the District of Columbia Circuit in *Associated Gas Distribs. v. FERC*, 810 F.2d 226, 231.

Consistent with Order 23, in the agency proceeding below, the Commission and the Administrative Law Judge repeatedly declared that the parties' historical intent was the sole issue to be determined. The Commission's hearing order directed: "The intention of the parties in agreeing to [area rate clauses] is precisely the issue set for hearing." (50a). The Initial Decision stated: "The precise issue set for review is whether [Northern and its Producers] *intended* [area rate clauses] to trigger payment of NGPA ceiling prices when the contracts at issue were entered into."

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[3] The alternatives of (1) an area rate clause "intended" to authorize NGPA rates and (2) the provision for such rates by amendment are set forth in 18 C.F.R. § 270.205 (1991) (contractual authorization to collect NGPA rates). (63a).

Initial Decision, *Northern Natural Gas Co.*, 43 F.E.R.C. ¶ 63,015 (1988). The Commission's affirmance of the Initial Decision stated: "The intention of the parties in agreeing to the area rate clause was the issue set for hearing." (31a). In its Order Denying Rehearing the Commission stated: "The precise issue is whether the Parties intended area rate clauses to trigger payment of NGPA ceiling prices when the contracts at issue were entered into." (23a).

Consistent with Order 23, the extensive hearing focused exclusively on historical intent. Northern and its producers asserted the requisite historical intent; Petitioners challenged this claim through cross-examination and the use of documentary exhibits.

Consistent with Order 23, the Initial Decision "concluded that at the time they entered into the contracts the Parties intended the area rate clauses 'to trigger payments of all generally applicable ceiling prices established by federal authority.' " Order Denying Rehearing (26a). The Commission affirmed, concluding that the contracting parties had demonstrated the requisite historical intent. (49a). On review,[4] Petitioners sought to demonstrate that the evidence of record not only failed to support the requisite intent, but that the record compelled the conclusion that the parties did not intend to cover NGPA prices in the approximately 1200 contracts still at issue.[5]

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[4] Petitioners sought review pursuant to the judicial review sections of the Natural Gas and Natural Gas Policy Acts. (58a and 61a).

[5] Many contracts were eliminated at an early stage of the proceeding because they contained language indicating an intent to adopt gas prices set by Congress.

The court of appeals stated that finding an original intent to provide for NGPA prices was indulging in a "fiction," or finding a fact that "is hardly historical reality." (15a). The court declared that "if the issue were truly one of historical intent," the evidence and argument presented by Petitioners "might be telling blows." (19a). Rather than adhere to the test of historical intent as established by the Commission, and affirmed as settled by the courts, the court invoked a new "gap-filling" test: "whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses." (16a). Without providing the parties the opportunity to make any argument or showing regarding its new test, the court affirmed the Commission, based on its own fact-finding under its newly devised standard.

On rehearing, Petitioners urged that the court's invocation of its new standard (the "gap" test) was an impermissible revision of the rule established in the Order 23 series, affirmed by the Fifth Circuit in *Pennzoil* and recognized as settled by the District of Columbia Circuit itself in *Associated Gas* and that the court's affirmance of the Commission on grounds never advanced by the agency violated this Court's *Chenery* rule. *See SEC v. Chenery Corp.*, 332 U.S. 194 (1947). Petitioners further urged that the court's finding that the claim to historical intent was a "fiction" dispositively resolved the issue adjudicated pursuant to Order 23, and required a reversal of the Commission's holding in favor of the contracting parties. Finally, Petitioners pointed out that even if the court's invocation of a new test was lawful, the court's *de novo* application failed the test of common sense.

For example, the Commission found, and the court's own decision reflected, that by 1985, when NGPA prices were well in excess of those at which gas could be purchased on the open market, the contracting parties had ceased to pay and to receive NGPA prices under hundreds of contracts at issue. Thus, in the absence of historical intent, the court of appeals filled a contract gap by imposing prices far higher than those which the contracting parties themselves had actually been employing for over six years.

On rehearing, the court conceded that the Commission's statement of the "controlling issue" appeared to "focus on historic intent". (4a). The court reaffirmed that contracting parties' claims to an intent to cover Congressional rates "would have been overwhelmingly contrary to fact." (5a). The court thereby made plain its finding that, by the test of historical intent, the contracting parties had failed to prove their case. Nevertheless, the court declared that the test established by the Commission, and followed by all the parties, would result in a "farce" and a "wild goose chase." (5a). Without citing any support in the language or logic used by the Commission, the court declared that it could "infer" that the historical intent language used by FERC was a "shorthand" for the hypothetical intent test newly imposed by the court, and reiterated its affirmance of the FERC decision under the new test. (5a).

REASONS FOR GRANTING THE WRIT

The traditional bases for grant of the writ pervade this case. The nation's foremost court of appeals in administrative matters has disregarded the most basic principles of administrative law, as established by this

Court and the courts of appeal. The District of Columbia Circuit's *sua sponte* invocation of a new rule to govern a decade long proceeding has destroyed statutory and precedential assurance that parties to an administrative proceeding can rely on the courts to apply the directly governing administrative rule. The court's action is especially egregious in light of the affirmance of the Commission's rule by another circuit, and this Court's denial of certiorari in that case. The court's declaration of a new rule by fiat, and its decision based on its fact finding under the new rule, has skewed the balance between the judicial and the administrative role developed by this Court over the course of the last half century. Further, the court's usurpation of administrative decisionmaking authority has deprived Petitioners of basic due process rights to present evidence and argument addressing the standard by which their case would be judged. Collectively, these errors would radically alter the delicate but previously undeniable line that has emerged to demarcate the roles of court and agency. If left uncorrected, the decision stands as a warning to those who must proceed before agencies that reviewing courts can at any time alter the basic rules of the game.

1. **The District of Columbia Circuit's *Sua Sponte* Revision of an Agency Rule Previously Made and Deemed Final by the Courts and Relied on During a Decade of Litigation Destroys the Predictability and Finality on Which the Administrative Process Depends**

In *Pennzoil Co. v. FERC*, 645 F.2d 360, *cert. denied*, 454 U.S. 1142 (1982), the Fifth Circuit, with exceptions not relevant here, affirmed the procedures

established by the FERC to determine whether NGPA ceiling prices could be collected under natural gas contracts entered into prior to the enactment of that law. The Fifth Circuit made clear that the test to be applied under the Order 23 rules is historical intent. "[T]he question is what *was* the parties' intent relative to the scope of the [area rate] clause." *Pennzoil*, 645 F.2d at 390 (emphasis added).

In 1987, the District of Columbia Circuit confirmed "that the validity of the Commission's Order No. 23 rulemaking series is settled by the Fifth Circuit's 1981 *Pennzoil* decision." *Associated Gas*, 810 F.2d at 231. *Associated Gas* summarized the Commission's conclusion in its Order 23 rulemakings—"[w]hether any *particular* clause constituted sufficient authority for charging [NGPA prices] . . . was a question of the parties' intent." *Id.* at 229.[6] The court, citing *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 335-37 (1958), recognized that "we may not unsettle any issue settled by *Pennzoil*." *Associated Gas*, 810 F.2d at 231. *Tacoma* interpreted the finality language of the judicial review provision of the Federal Power Act, which is essentially identical to the language in the Natural Gas Act [NGA] and the NGPA.[7] *Associated Gas* explained that the "judicial review pro-

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[6] The court explained: "More particularly, the Commission established two presumptions: First, that the parties to a natural gas contract know currently *what their intent was when they executed the contract*; and second, that they are truthful in their assertions *regarding that intent*. Order on Rehearing Order 23-B at p. 30,475." *Associated Gas*, 810 F.2d at 230 n.1 (emphasis added, citations omitted).

[7] In Order 23, FERC acted pursuant to both the NGA and the NGPA.

visions of the NGA and NGPA, 15 U.S.C. §§ 717r(b), 3416(a)(4), authorize review petitions filed in a court of appeals within sixty days after the Commission acts on an application for rehearing; these review prescriptions render the court's judgment 'final, subject to review by the Supreme Court . . . upon certiorari or certification.' " *Associated Gas*, 810 F.2d at 231 n.3.

As *Associated Gas* recognized, the Fifth Circuit's affirmance of the Order 23 rule in *Pennzoil*, upon this Court's denial of review, definitively settled the Commission's rule. The court below lacked the authority to modify or set aside the Order 23 rule; but that is precisely what the court did. In lieu of the test of historical intent established by FERC in Order 23, the court substituted its own test of "filling gaps in the terms of an agreement with respect to matters that the parties did not have in contemplation and as to which they had no intention to be expressed." (20a).

The historical intent test used by FERC and the parties and the "gap filling" test substituted by the court are diametrically opposed. The first seeks to determine the actual historical intent. The second starts with the conclusion that there was no actual historical intent.

Consistent with the historical intent test, at hearing the contracting parties filed testimony asserting that their actual historical intent was broad enough to encompass NGPA prices, and Petitioners sought to disprove the existence of such actual historical intent. The contracting parties never argued that there was a "gap" in the contracts—that there was no actual historical intent. The very suggestion of a gap would have fatally contradicted their sworn assertions to

actual historical intent. If the contracting parties had conceded, *ab initio*, that there was a gap, their path to NGPA prices would have been to amend their contracts, as permitted by the FERC, and not through the Order 23 procedures.[8]

On rehearing, the court conceded that the historical intent test was the test "literally" stated by the Commission and by Order 23, and that it had not been met. However, the court made equally clear that it would not follow that test. The court declared that, if "taken literally," the FERC's statement of the issue would "make the Commission's inquiry a farce," because in the decade prior to the NGPA's enactment, "no one . . . had suggested adoption of anything called 'NGPA' ". (4a). The court stated that:

> [e]ven if we expand the reference [to actual intent] to avoid that absurdity, and read it as encompassing national legislation setting rates in lieu of the Federal Power Commission's area rates, the working presumption of Order No. 23—essentially that the parties commonly formed an "intent" to cover such congressional rates—would have been overwhelmingly contrary to fact: only a relatively small proportion of actors in the natural gas market are likely in the early days to have contemplated the critical legislative develop-

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[8] In *Pennzoil*, 645 F.2d at 367-71, the Fifth Circuit summarized the development of the Order 23 rule. Order 23 was FERC's response to the gas industry's assertion that NGPA prices were historically intended; those contracting parties who could not assert such intent were free to amend their contracts. Contracts that were amended to expressly provide for NGPA prices were not at issue in the proceeding below.

ment (and thus been able to form an intent). (4-5a).

Once the court agreed with Petitioners that the alleged historical intent was a "fiction," it was required to hold that the contracting parties had failed to sustain their burden of proof. Instead, dissatisfied with what it acknowledged to be "the working presumption of Order No. 23," it changed the rule, in the process rewarding the very parties whose assertions of historical intent the court deemed a "fiction". (5a).

The court justified its revision of the final rule on grounds that adherence to the rule of historical intent would require a "wild goose chase". (5a). In the decade long administrative proceeding below all parties engaged in just such a "wild goose chase" on the premise that a rule made by an agency in a vigorously contested and highly visible rulemaking and repeatedly confirmed by the courts, could be relied on to mean what it plainly says.

The significance of the court's ruling for administrative law can be appreciated in the context of this case. The 1991 decisions below had their genesis in a law enacted by Congress in 1978. It was well understood that the NGPA would fundamentally alter federal regulation of natural gas, and the gas industry itself. The entire natural gas industry—producers, pipelines, consumer groups, and state commissions—participated in the rulemaking proceedings that set the ground rules for the implementation of the NGPA. The participants in the Order 23 rulemaking included numerous pipelines and producers; pipeline, producer and distribution company associations; and state commissions, including Petitioners Minnesota and South

Dakota Commissions. "[A]ll interested persons," the Fifth Circuit declared in affirming Order 23, "had ample opportunity to present their views." *Pennzoil*, 645 F.2d at 371-72. Petitioner state commissions participated in this rulemaking with full expectation that the resulting rules would be relied on to govern the disposition of hundreds of millions, indeed billions, of dollars.

Because the stakes were so high, the Petitioner state commissions recognized that litigation to pursue what they viewed as their consumers' rights would be costly, difficult, and long. However, along with the hundreds of other parties to the FERC proceeding[9] the state commissions undertook what would turn out to be a decade of litigation with the understanding that the FERC's rule, as affirmed in 1981 by the Fifth Circuit in *Pennzoil* and made final when the petition for certiorari was denied, would be the applicable rule governing their specific case. The legitimacy of this conviction was confirmed in 1987 when the District of Columbia Circuit itself declared the FERC rule to be settled. *See Associated Gas.*

In this case, it is Petitioners who suffer the effects of such misplaced reliance. In the future, if the court's extraordinary assertion of judicial authority to unsettle a "settled" rule is not addressed and corrected in this case, the costs of the resulting uncertainty will be borne by all who must evaluate commitments to participate in any administrative process.

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[9] Order No. 23 provided that all parties to the gas contracts at issue would automatically be made parties to Order 23 proceedings. Therefore, literally hundreds of gas producers were, by operation of the rule, parties to the proceeding before FERC.

2. The District of Columbia Circuit's Unilateral Decisionmaking Destroys the Principle of Deference on Which Congress and the Courts Have Erected the Administrative Process

In tandem with its *sua sponte* revision of a rule made final by statute and decision, the court below usurped the decisionmaking role long delegated by Congress to the administrative agencies. In a series of landmark decisions, this Court has periodically sought to demarcate the boundaries between court and agency, and to limit judicial intrusion into the agency's domain. *See, e.g., SEC v. Chenery Corp.*, 332 U.S. 194 (1947); *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978); *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The appellate decisions below radically revise the boundaries identified by these cases; indeed, they leave the agency and participants before it as mere bystanders to the administrative process.

It is "a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such actions solely by the grounds invoked by the agency." *Chenery*, 332 U.S. at 196. "[T]he purpose of the rule is to avoid 'propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency.' " *Burlington Truck Lines v. United States*, 371 U.S. 156, 169 (1962), quoting *Chenery*. Even if the Commission had argued in the court of appeals that the test which

would save its decision was gap filling, the court would have been required to reject that argument.[10]

Here, the court did more than "propel" itself into the administrative domain; the court usurped that domain. In doing so, the court did not substitute a rationale for one that was not, but might have been, employed by the agency; it employed a rationale which was diametrically opposed to the rationale actually employed by the agency, and all parties before it.

In its Opinion on Rehearing, the court responded to Petitioners' argument that its opinion had violated *Chenery*. The court's answer consisted of asserting its view that the application of Rule 23 as written and as interpreted by the FERC would have resulted in a "wild goose chase" since what the producers were required to prove and what they testified to at length during the hearings was "overwhelmingly contrary to fact." (5a). Based on the court's own conclusion, it would have had no choice under *Chenery* but to find the Commission's actions "inadequate and improper;" the court would have been "powerless to affirm the administrative action." *See Chenery*, 332 U.S. at 196. It is disingenuous for the court to hold that the agency is speaking with the clarity that *Chenery* requires[11]

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[10] In fact, FERC's Brief in the court of appeals (FERC Brief at 1) identified the sole issue as whether FERC "reasonably concluded that 'area rates clauses' . . . were intended by the contracting parties to authorize payment of the maximum just and reasonable rate set by Congress" in the NGPA.

[11] "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must

and at the same time to claim that the agency is speaking in a "shorthand" that requires the court to impose a new and diametrically opposed test to confront "the reality of the case." (5a). Thus, the court's affirmance exceeded the limits on its powers imposed by *Chenery*.

In this case, it could not be clearer that the Commission and its counsel said exactly what they meant to say. The court does not dispute that the Commission, in its rule, its decisions, and its argument before the court plainly stated that the issue was original intent. Here, the regulatory history of the rule shows why the Commission's rule was stated as it was, and not as the rule the court would prefer. Here, the reviewing court could cite nothing in the record as the basis for substituting its rule for the rule it admits was expressly stated by the agency. If the clear and repeated statements of the issue by the agency could be disregarded, the decade of litigation pursued by all parties and the Commission in reliance on them could not. If the court's "explanation" is allowed to stand, nothing will be left of *Chenery* or *Burlington Truck Lines*. Courts will always be able to escape from *Chenery* or *Burlington Truck Lines* by asserting that they are merely "inferring" what the agency or the agency's counsel meant to say.

Once the transparent deficiency of the court of appeals' lip service to *Chenery* is considered, the decisions below amount to the assertion that no deference whatsoever need be paid to the agency. As such, the decisions are a frontal assault on all of this Court's

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be precise from what the agency has left vague and indecisive." *Chenery* 332 U.S. at 196.

landmark decisions requiring judicial deference to agency decisionmaking. *See, e.g., Chevron.* Here, even assuming that the Order 23 rule were not final, and the court was therefore free to consider the reasonableness of the rule requiring historical intent, then, if the court found that rule unreasonable, it would still be obligated to remand to the agency for application of the new standard. The court did not even concede this degree of deference.

The court's unilateral rush to judgment under its new rule further highlights the wisdom of the deference to the agency provided for by a long and consistent line of judicial precedents. On rehearing, Petitioners showed that even if the court were somehow correct in its opinion that the gap-filling test was appropriate, the court's *de novo* application of the test was—by the test of common sense—remarkably at odds with the undisputed facts of record. The court's decision to fill the contract "gap" with NGPA prices had the direct and most implausible effect of imposing prices that are well above the price which the contracting parties, in fact, bargained for at arm's length when they had actual knowledge of the NGPA. The price imposed by the court is also well above the prices which the parties have, in fact, long been paying and receiving under the contracts at issue.[12] From

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[12] In affirming based on the "gap" test, the court of appeals appeared to focus on the evidence as to course of performance in the payment of NGPA prices. (17-19a). The Commission found, and the court's own decision reflects, that when the gas market changed in the mid-1980's, Northern ceased paying and producers ceased receiving NGPA prices under numerous contracts in the case. *See* 46a and 17-18a. The record further shows that upon the enactment of NGPA, Northern, with knowledge of that

the vantage of the equitable considerations which are a central part of "gap filling" analysis, the court provided a windfall to the very contracting parties whose testimony as to actual intent it found to be a fiction.[13] The court of appeals did not address Petitioners' arguments under the new standard. The agency was never given the opportunity to do so.

The court's refusal to recognize the agency's rightful decisionmaking role was matched by a refusal to provide the minimal due process accorded participants

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law, (1) refused to enter into unequivocal commitments to contracts at NGPA prices, (*See, e.g.*, Exhibit P-R-37, Pt. III J.A. Vol. 2 at 1838) and (2) refused requests by producers to amend pre-existing contracts to expressly provide for NGPA prices, absent new consideration. (*See, e.g.*, Exhibit P-R-25 at item 31, Pt. III J.A. Vol. 2 at 1832.) Thus, actual performance does not support the conclusion which the court reached on the purported basis of actual performance.

[13] As stated by Professor Farnsworth, on whom the court relied, "basic principles of justice [should] guide a court in extrapolating from the situations for which the parties provided to the one for which they did not." E. Allan Farnsworth, *Contracts*, § 7.16, at 524 (1982). The court appeared to assume that, absent NGPA prices, the contracting parties would have been limited to a confiscatory, pre-1979 price pursuant to the Natural Gas Act. (13a). In fact, the governing NGA prices contained escalation provisions. Thus, the rate for "1975-76 vintage" gas has escalated at the rate of one cent per quarter from a base of $1.42 per Mcf (thousand cubic feet). *See American Pub. Gas Ass'n v. FERC*, 567 F.2d 1016, 1025 (D.C. Cir. 1977) *cert. denied* 435 U.S. 907 (1978). The current rate is in excess of the current market price (*See, e.g., Gas Daily*, November 1, 1991, at 1-2, which with some exceptions, shows prices in the $1.50 - $1.80 perMcf range) and substantially below the current NGPA Section 108 price ($6.88) and post-1974 Section 104 price ($3.14) which the court's decision mandates. 18 C.F.R. § 271 (1991).

in agency proceedings. The first indication that the historical intent standard would not be applied and that the decision would turn upon gap filling appeared in the decision of the court of appeals. The parties were thus deprived of notice and hearing in violation of the Administrative Procedure Act and Due Process.

In *Hatch v. FERC*, 654 F.2d 825 (D.C. Cir. 1981), the court held:

> The Administrative Procedure Act requires that a person involved in an agency adjudicatory hearing "shall be timely informed of. . .[the] law asserted." 5 U.S.C. § 554(b)(3). Courts have uniformly held that for an agency to meet this obligation where it seeks to change a controlling standard of law and apply it retroactively in an adjudicatory setting, the party before the agency must be given notice and an opportunity to introduce evidence bearing on the new standard. . . . Supreme Court cases suggest that such notice and opportunity to meet the new standard is a constitutional imperative of due process as well.

Id. at 835 (citations omitted). The court went on to state that where the change in standard is such "that additional facts of a different kind may now be relevant for the first time, litigants must have a meaningful opportunity to submit conforming proof." *Id.* at 835.

In *Rodale Press, Inc. v. FTC*, 407 F.2d 1252, 1256-57 (D.C. Cir. 1968), the court held:

> it is well-settled that an agency may not change theories in midstream without giving respondents reasonable notice of the change. . . .
>
> By substituting an issue as to the books' *content* for the one framed by the pleadings, effectiveness of the books' ideas and suggestions, the Commission has deprived petitioners of both notice and hearing on the substituted issue.

Equally clearly, the decision here has deprived Petitioners of both notice and hearing on the substituted issue. Due process "condemns such methods and defeats them." *West Ohio Gas Co. v. Public Utils. Comm'n of Ohio*, 294 U.S. 63, 71 (1935). Due process should not be omitted because the court believes it can perceive better what the agency should have done. Where, as in this case, due process was violated, the result is not only deprivation of the Petitioners' rights but also the expansion of the reviewing court, retroactively, into the administrative process.

CONCLUSION

As the National Association of Regulatory Utility Commissions (NARUC), which includes in its membership virtually every state public utility regulatory agency in the nation, asserted below in support of rehearing, state commissions and all others who expend limited resources on participation in federal regulatory proceedings must have confidence that the basic rules of administrative law—finality, deference, due process—will be followed so that these governmental agencies can fulfill their responsibilities efficiently and in an orderly way. Consistent with that

policy, this Court has been wary where the courts have attempted to encroach on those duties expressly reserved to the federal administrative agencies.

The decision below destroys, in an insidiously appealing way, the consistent line of cases that have settled the boundaries between agency and court. It silences agency opposition by affirming the agency. Nevertheless, its potential for creating chaos is evident. The potential for uncertainty and *de novo* review at the appellate level presents a fatal attraction for every litigant. From the judiciary's viewpoint, this will increase the likelihood that some administrative cases that otherwise should have been considered final will be appealed to the courts, since results can vary widely if new and different rules can be created during judicial review. From the parties' viewpoint, the regulatory process will become a nightmare of uncertainty with wasteful expenditures of time and money and little to guide state commissions and the untold other citizens, businesses and public agencies who must engage in the large-scale economic litigation that is brought before the federal regulatory agencies. The writ should be granted to bring the law of the Court of Appeals for the District of Columbia

Circuit in accord with the precedents established by this Court and applied in all other circuits.

November 18, 1991

Respectfully submitted,

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91-798 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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November 18, 1991

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

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United States Court of Appeals
for the District of Columbia Circuit

No. 90-1136 September Term, 1990

South Dakota Public Utilities Commission,

Petitioner

v.

Federal Energy Regulatory Commission,

Respondent

---

and Consolidated Cases

BEFORE: Mikva, Chief Judge; Wald, Edwards, Ruth B. Ginsburg, Silberman, Buckley, Williams, D.H. Ginsburg, Sentelle, Thomas, Henderson and Randolph, Circuit Judges

O R D E R

Petitioner's Suggestion For Rehearing En Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

Per Curiam
FOR THE COURT:
CONSTANCE L. DUPRE, CLERK

BY:

Robert A. Bonner
Deputy Clerk

Circuit Judges Ruth B. Ginsburg and Henderson did not participate in this matter.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-1136, 90-1215 and 90-1237

Decided Aug. 20, 1991.

Rehearing and Rehearing En Banc Denied
Aug. 20, 1991.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, et al.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent,

MAXUS EXPLORATION COMPANY, NORFOLK ENERGY, INC., ARCO OIL AND GAS COMPANY, EXXON CORPORATION, KANEB EXPLORATION, INC., OKMAR OIL COMPANY, SHELL WESTERN E & P, INC., SHENANDOAH OIL CORPORATION, TEXAS INTERNATIONAL PETROLEUM COMPANY AND PHOENIX RESOURCES COMPANY, KAISER-FRANCIS OIL COMPANY AND LEBEN OIL CORPORATION, BASS ENTERPRISES PRODUCTION COMPANY,
Intervenors.

STEPHEN F. WILLIAMS, *Circuit Judge*:

Petitioners seek rehearing [1] on the theory that the court's opinion violates the principle of *SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1575, 1577, 91 L.Ed. 1995 (1947), that courts may judge the propriety of an administrative agency's act "solely by the grounds invoked by the agency." Specifically, the argument is that FERC purported to decide the application of area rate clauses to NGPA ceilings on the basis of the actual, historical intent of the parties at the time of contracting, whereas the court upheld the Commission's decision on the basis of a hypothesized intent as to what parties would have intended had they in fact contemplated the onset of congressionally specified ceilings.

Supporting the petitioners' view are statements of FERC appearing to focus on historic intent. For example, one reference highlighted by petitioners is the order of the Commission setting the case for hearing and identifying the controlling issue as whether Northern and the producers "*intended* [area rate clauses] to trigger payment of NGPA ceiling prices when the contracts at issue were entered into." 43 FERC ¶ 63,015 at 65,147 (1988) (emphasis in original).

The trouble with these citations is that taken literally they make the Commission's inquiry a farce. It is inconceivable that contracting parties in (say) 1965 intended the clauses "to trigger payment of NGPA ceiling prices", as no one at that era had suggested adoption of anything called "NGPA" or "Natural Gas Policy Act". Even if we expand the reference to avoid that

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[1] They have also suggested rehearing *en banc*. The full court's disposition of the suggestion is covered in a separate order issued concurrently.

absurdity, and read it as encompassing national legislation setting rates in lieu of the Federal Power Commission's area rates, the working presumption of Order No. 23 -- essentially that the parties commonly formed an "intent" to cover such congressional rates -- would have been overwhelmingly contrary to fact: only a relatively small portion of actors in the natural gas market are likely in the early days to have contemplated the critical legislative development (and thus been able to form an intent). Thus, even read in this moderately literalist way, the Commission's mandate to the administrative law judge would have been to embark on a wild goose chase. Moreover, it is clear from the writings of the contract scholars discussed in the court's opinion that courts themselves commonly use the language of historic intent in situations that are really ones of hypothesized or reconstructed intent. See, e.g., 6 Samuel Williston, A Treatise on the Law of Contracts § 825 at 52-60 (3d ed. 1962). It is hardly a violation of *Chenery* for a reviewing court to infer that the agency's usage was, similarly, a kind of shorthand. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 95 S.Ct. 438, 42 L.Ed. 2d 447 (1974).

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 90-1136, 90-1215 and 90-1237

Argued March 14, 1991.

Decided May 24, 1991.

Rehearing and Rehearing En Banc
Denied August 20, 1991.

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, *et al.*,

Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

Maxus Exploration Company, Norfolk Energy, Inc., Arco Oil and Gas Company, Exxon Corporation, Kaneb Exploration, Inc., Okmar Oil Company, Shell Western E & P, Inc., Shenandoah Oil Corporation, Texas International Petroleum Company and Phoenix Resources Company, Kaiser-Francis Oil Company and Leben Oil Corporation, Bass Enterprises Production Company,

Intervenors,

Northern Natural Gas Co., a division of Enron Corp.

PEOPLES NATURAL GAS COMPANY,
DIVISION OF UNTILICORP UNITED, INC.,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent,

Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division of Santa Fe International Corporation, Santa Fe-Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Contenental Energy, John H. Hendrix, Okmar Oil Company, Neleh Gas and Oil Company, Damson Oil Corporation, Montana Consumers Counsel, Public Utilities Commission Of South Dakota and Montana Public Utilities Commission, Intervenors, Northern Natural Gas Co., a division of Enron Corp.

MINNESOTA PUBLIC UTILITIES COMMISSION,

Petitioner

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent

Mapco, Inc., Mapco Oil and Gas Company, Santa Fe Minerals, a Division Of Santa Fe International Corporation, Santa Fe-

Andover Oil Company, Santa Fe Braun, Inc., Danden Petroleum, Inc., Werner Oil, Inc., CNG Producing Company, and Russell Freeman, d/b/a Continental Energy, Wayman W. Buchanan, Kaneb Exploration, Inc., Champlin Exploration, Inc., Shell Western E & P, Inc., Exxon Corporation, Norfolk Energy, Inc., Arco Oil and Gas Company, Division Of Atlantic Richfield Company,

Intervenors,

Northern Natural Gas Co., a division of Enron Corp.

Petitions for Review of an Order of the F.E.R.C.

Daniel Guttman, with whom *Frances E. Francis* and *Daniel I. Davidson*, for South Dakota Public Utilities Commission, *John M. Cutler, Jr.*, for Peoples Natural Gas Company and *Jon Kingstad* for Minnesota Public Utilities Commission were on the joint brief, for petitioners in Nos. 90-1136, 90-1215 and 90-1237. *Jocelyn F. Olson* for Minnesota Public Utilities Commission also entered an appearance for petitioner.

Timm L. Abendroth, Attorney, Federal Energy Regulatory Commission, with whom *William S. Scherman*, General Counsel and *Joseph S. Davies*, Deputy Solicitor, Federal Energy Regulatory Commission were on the brief, for respondent in all cases. *Jerome M. Feit*, Attorney, Federal Energy Regulatory Commission also entered an appearance for respondent.

Stephen L. Teichler, with whom *Kent K. Carter*, *C. Roger Hoffman* and *Douglas W. Rasch* for Exxon Corporation and the Estate of E.G. Rodman, *Charles H. Shoneman* and *Randall S. Rich* for Graham-Michaelis Corporation, Kaiser-Francis Oil Company, Petroleum, Inc., Phoenix

Resources Company, Shenandoah Oil Company, Texas International Petroleum Company, Trees Oil Company, *Robert F. White*, *Robert L. Williams*, *Lester Wilkonson*, *Philip R. Ehrenkranz* and *Paul F. Forshay* for John H. Hendrix Corporation, Neleh Gas and Oil Corporation, et al. and Okmar Oil Corporation, *James B. Wilcox* and *Richard T. Saas* for Kaneb Exploration, Inc., and Leben Oil Corporation, *Johnny J. Akins*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Kerr-McGee Corporation, *Jennifer A. Cates* for Lear Petroleum Corporation and Tex/Con Oil and Gas Company, *Robert W. Clark* and *Gail S. Gilman* for Mapco, Inc., Mapco Oil and Gas Company and Werner Oil, Inc., *Robert C. Murray*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Marathon Oil Company, *R. Brent Harshman* and *Nancy J. Shancke* for Maxus Exploration Company, *Gary M. Prescott* and *Nancy J. Shancke* for Mesa Operating Limited Partnership, *Marge O'Connor*, *Jon Brunenkant*, *Katherine B. Edwards* and *Mark Haskell* for Mobil Natural Gas, Inc., Mobil Producing Texas and New Mexico, Inc., Mobil Oil Exploration and Producing Southeast, Inc., *Albert S. Tabor* and *Catherine O'Harra* for Norfolk Energy, Inc., *Michael L. Pate* for Oxy USA Inc., *Robert Lemon* for Perryton Operating Company, *Nancy J. Shancke* for Philcon Development, Phillips Petroleum Company, Phillips 66 Natural Gas Company and Sidwell Oil and Gas, Inc., *William H. Boyles*, *Robert W. Clark* and *Gail S. Gilman* for Santa Fe-Andover Oil Company, Santa Fe Minerals, Inc., and Santa Fe Braun, Inc., *Kathleen T. Puckett* for Shell Western E&P Company, *Philip C. Wrangle* and *Nancy J.Shancke* for Sonat Exploration Company, *John P. Beall* and *Nancy J. Shancke* for Texaco, Inc., and Texaco Producing, Inc., *Kerry R. Brittain* and *Nancy J. Shancke* for Union Pacific Resources Company were on the joint brief of Producer Intervenors in all cases. *James L. Trump* for John H. Hendrix Corporation, et al. and Okmar Oil Company, *Charles J. McClees, Jr.* and *James A. Ruoff* for Shell Western E&P, Inc.,

James L. Trump for Neleh Gas and Oil Corporation also entered appearances for Producer Intervenors.

Deborah A. MacDonald, Bill H. Kochenmeister, George J. Meiburger, Frank X. Kelly and *Steve Stojic* were on the brief for intervenor Northern Natural Gas Company, Division of Evron Corporation in all cases.

John M. Cutler, Jr. entered an appearance for petitioner Peoples Natural Gas Company in No. 90-1215.

Kevin M. Sweeney, Frank H. Markle and *Charles F. Hosmer* entered appearances for Arco Oil and Gas Company.

James T. McMancis, Joseph O. Fryzell and *Steven K. Schroeder* entered appearances for intervenor Northwest Pipeline Corporation.

Robert H. Benna, David D. Withnell, Terrance J. Collins and *Margaret L. Bollinger* entered appearances for intervenor Tennessee Gas Pipeline Company.

Michael E. Small entered an appearance for intervenor Williams Natural Gas Company.

Nancy J. Shanche and *Lisa A. Machesney* entered appearances for intervenor Cabot Petroleum Corporation.

Jack M. Wilhelm, Jon L. Brunenkant and *Mark R. Haskell* entered appearances for intervenor Amoco Production Company.

Nancy J. Shanche, Joseph E. Mixon and *David G. Stevenson* entered appearances for intervenor Amerada Hess Corporation.

James L. Trump, Paul F. Forshay and *Philip E. Ehrenkranz* entered appearances for Damson Oil Corporation.

William J. Grealis and *Jeffrey G. DiSciullo* entered appearances for intervenor Transwestern Pipeline Company.

Georgetta J. Baker entered an appearance for intervenor Natural Gas Pipeline Company of America.

Randall S. Rich and *Charles H. Shoneman* entered appearances for intervenors Bass Enterprises Production Company, American Trading and Production Corporation, Grace Petroleum Corporation, Petroleum, Inc. and J. Burns Brown Operating Company.

Gerald P. Thurmond, *Walker C. Taylor*, *Kim M. Brown*, *David J. Evans*, and *Patrick M. Ankuda* entered appearances for intervenor Chevron, USA, Inc.

Ernest J. Altgolt, III, entered an appearance for intervenor Conoco, Inc.

James U. Hamersley entered an appearance for intervenor Fina Oil and Chemical Company.

Stephen L. Teichler, *Kent K. Carter* and *Mario M. Garza* entered appearances for intervenor Anadarko Petroleum Company.

Richard T. Saas and *James B. Wilcox* entered appearances for intervenor Champlin Exploration, Inc.

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge STEPHEN F. WILLIAMS.

STEPHEN F. WILLIAMS, Circuit Judge:

In the decisions under review the Federal Energy Regulatory Commission addressed a problem arising from natural gas pipelines' and producers' adjustments of their contract relations in response to federal ceiling prices on interstate sales at the wellhead. The Federal Power Commission

(FERC's predecessor) initially attempted to conform to *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 74 S.Ct. 794, 98 L.Ed. 1035 (1954), which construed the Natural Gas Act to require such ceilings, by setting "just and reasonable" rates producer by producer. The process proved "laborious", so much so as to earn it recognition as the "outstanding example in the federal government of the breakdown of the administrative process". *Permian Basin Area Rate Cases*, 390 U.S. 747, 758, 88 S.Ct. 1344, 1355, 20 L.Ed.2d 312 (1968). The Commission then switched to setting "area" rates, governing sales by all producers in each of several regions.

The ceiling prices put interstate pipelines at a competitive disadvantage vis-a-vis intrastate pipelines, which could offer market prices. To mitigate that disadvantage, the interstates often agreed to include indefinite price escalator clauses in their long-term purchase contracts. After initial uncertainty, the Commission authorized one form of indefinite price escalator (an only one), the "area rate clause", which automatically raises the price to the area rate applicable at the time of delivery. See Order No. 329, 36 FPC 925 (1966), codified at 18 CFR § 154.93(b-1) (1990). The pipeline whose contracts are at issue here, Northern Natural Gas Company, agreed to such clauses in about 1200 contracts between the mid-1960s and 1978.

When Congress passed the Natural Gas Policy Act in 1978, it took away most of FERC's authority to set "just and reasonable" rates and instead provided statutory ceilings. See 15 U.S.C. § 3301 et seq. (1988). The question arose whether area rate clauses, which generally spoke in terms of escalation to "just and reasonable" rates set by the Federal Power Commission, authorized producers to demand the new NGPA ceilings. For gas covered by § 104 of the NGPA, for example, this would be the April 20, 1977 "just and reasonable" rate plus an adjustment for general price inflation thereafter. See 15

U.S.C. § 3314. The parties do not state what price would apply if the area rate clause did not authorize NGPA rates, but it appears likely that under most contracts the producer would be entitled to no more than the rate the gas had reached at some point before the effective date of the NGPA.

In Order No. 23, FERC Statutes & Regulations, Regulations Preambles 1977-1981 ¶ 30,040 (1979), FERC decided that area rate clauses indeed *could* be interpreted to authorize collection of NGPA rates. See *id.* at 30,315-16. If the parties to a contract agreed on that interpretation, their agreement would normally control. *Id.* at 30,316. If protestors (such as those here, a purchaser from Northern and representatives of downstream consumers) offered specific evidence that the clause in question did not supply contractual authority, the case would be set down for a hearing; if not, the protest would be dismissed. See Order No. 23-B, FERC Stats. & Regs. ¶ 30,065 at 30,455 (1979); Order on Rehearing Order No. 23-B, FERC Stats. & Regs. ¶ 30,073 at 30,475-76 (1979); see also 18 CFR § 154.94 (1990) (codifying the rules). The Fifth Circuit upheld these arrangements, with some modifications, in *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981). See also *Pennzoil Co. v. FERC*, 789 F.2d 1128 (5th Cir. 1986); *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988).

More than ten years ago Northern invoked the Commission's procedure, filing a list of over 1200 contracts containing area rate clauses that it and the relevant producers agreed authorized payment of NGPA rates. Various protestors challenged the submission, pointing to a statement by Peoples Natural Gas Company, than a division of Northern's parent company, made in litigation with a producer, that a specific area rate clause, worded exactly the same as some of those in the Northern contracts, did not require Peoples to pay NGPA ceiling rates. The Commission decided that "Peoples' interpretation of

the contract language can be attributed to Northern because of common control," see *Northern Natural Gas Co.*, 33 FERC ¶ 61,355 at 61,706 (1985), and that this satisfied the protestors' initial burden. It sent the matter to an administrative law judge for a hearing. *Id.*

After extensive discovery, including two opportunities for the protestors to review all of Northern's relevant files, the ALJ held the required hearing. Fourteen Northern officials and 56 producer witnesses testified for Northern and were cross-examined at length, producing a transcript of about 5400 pages. See *Northern Natural Gas Co.*, 43 FERC ¶ 63,015 at 65,147-48, 65,169 (1988) ("Initial Decision"); *Northern Natural Gas Co.*, 48 FERC ¶ 61,177 at 61,649 (1989) ("Order"), *reh'g denied*, 50 FERC ¶ 61,288 (1990). Another 58 producer witnesses were prepared to testify, but the ALJ decided that their testimony would be cumulative -- 56 was enough. The protestors offered no witnesses. See Initial Decision, 43 FERC at 65,147-48; Order, 48 FERC at 61,649.

The ALJ ruled that the evidence "over whelmingly" showed that Northern and the producers intended the area rate clauses "to trigger payment of all generally-applicable ceiling prices established by federal authority". See Initial Decision, 43 FERC at 65,149, 65,169. The ALJ considered the contract language, the parties' testimony of mutual intent, their course of dealing, their course of performance, and trade usage. *Id.* at 65,149-69. The Commission upheld the ALJ's decision, emphasizing the evidence of the parties' course of performance. Order, 48 FERC at 61,651-52. We affirm.

* * *

The ALJ framed the issue as being whether Northern and the producers "intended [area rate clauses] to trigger payment

of NGPA ceiling prices when the contracts at issue were entered into." Initial Decision, 43 FERC at 65,147 (emphasis omitted). The Commission's Order sometimes used a similar formula, see, e.g., 48 FERC at 61,648, and sometimes spoke of intent in a more generalized way, referring, for example, to evidence of "'Northern's intent to pay the highest prices allowed by law or regulation'", *id.* at 61,651 (evidently quoting a Northern witness). The latter formula tracks the Commission's conclusion in Order No. 23 that may gas producers and pipelines, in agreeing to area rate clauses, "intended to permit prices to escalate to the highest generally applicable ceiling rate allowed by governmental authority". FERC Stats. & Regs. at 30,314.

Neither formula seems to us to quite confront the reality of the case. It appears common ground that, at least until the latter party of the period, the parties were unlikely to have guessed that Congress would set the ceilings itself. For contracts of the earlier period, it seems something of a fiction to infer by "interpretation" that the parties "intended" escalation to statutory ceilings. Even the more general formula, which treats the parties' reference to Commission-determined rates as a short-hand for a broader intent (to escalate to the highest lawful rate), suffers the same flaw in a more subtle form: if the only issue the parties had occasion to address was fully solved by the narrower language, their intent as to the broader issue is hardly historical reality.

A number of contracts scholars frankly acknowledge the special character of such an inquiry. Farnsworth, for example, speaks of addressing issues that the contract language "omits", see E. Allan Farnsworth, Contracts §§ 7.15-.17 (1982), and Corbin distinguished between "interpretation", a term he reserved for exploring the meaning of words actually used, and "construction", which he applied to "filling gaps in the terms of an agreement, with respect to matters that the parties did not

have in contemplation and as to which they had no intention to be expressed", 3 Corbin on Contracts § 534 at 11 (1960). See also 6 Samuel Williston, A Treatise on the Law of Contracts § 825 (3d ed. 1962) (on "Fictitiously Imputed Intentions"). Thus a blunter way of framing the issue would be to ask whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses. The distinction is helpful, as we shall see shortly, because it puts in proper perspective a number of points raised by petitioners' counsel that assume the sole inquiry is into historical intent.

For the end of the period, while Congress was hammering out the terms of the NGPA, it can hardly be said that the parties omitted reference to statutory ceilings because they failed to foresee their arrival. For this period another reason comes into play (which indeed had been at work throughout the period, inhibiting anyone who did imagine the problem) -- the Commission's explicit rule that area rate clauses were the *sole* permissible form of indefinite price escalator. See 18 CFR § 154.93(b-1). [1] Here the inquiry more aptly concerns what the parties would have provided had the Commission allowed them to express their intent. As the Commission was obviously aware of the problem as it formulated Order No. 23, the order reflects its judgment that its earlier restriction of parties to area rate clauses should not prevent collection of statutory ceilings where the parties would have agreed to them. See FERC Stats. & Regs. at 30,315 (despite the limitations of 18 CFR § 154.93, FERC will give effect to escalator clauses that "specifically

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[1] Curiously, even the version published in 1990 contains only the reference to area rates, although the Commission had started setting *national* rates for certain gas in 1974. See Opinion No. 699, 51 FPC 2212 (1974).

permit escalation to Congressionally or legislatively authorized prices or which specifically reference Natural Gas Policy Act prices").

In affirming the ALJ, the Commission rested primarily on the evidence as to course of performance, which of course is probative whether one thinks of the problem in terms of historical or reconstructed intent. With narrow exceptions addressed later, Northern paid the NGPA ceilings for more than six years -- and not through oversight or inattention. Before the statute went into effect on December 1, 1978, officials of its Supply Division and its Law Department began internal discussions on the issue. See Initial Decision, 43 FERC at 65,160. Three days before the President signed the Act, a company attorney circulated a memo among the gas acquisition staff asserting that the area rate clauses in Northern's contracts entitled producers to charge the NGPA prices. See Memorandum from Patrick J. McCarthy (Nov. 6, 1978), *reprinted in* Joint Appendix ("J.A.") at 1614. Its conduct clearly conformed to this view for more than six years.

Protestors regard this long pattern as completely undermined by Northern's decision, implemented on January 1, 1985, to stop paying NGPA ceiling prices under the contracts at issue for categories of gas still subject to regulation. They claim this shift reveals that the prior six years' behavior was merely a ploy "to curry favor with Producers in a time of shortage", Reply Brief for Petitioners at 13 n. 13, and assert that Northern's true construction emerged only in 1985 when it stopped paying NGPA prices because of a gas glut. As the petitioners see it, the post-1984 evidence is paramount because it shows that Northern did not intend to be obligated by the area rate clauses to pay NGPA ceiling prices "*under all market conditions*". Brief for Petitioners at 19 (emphasis in original).

It is undisputed, however, that Northern sought price relief, in the form of contract amendments, without regard to whether the area rate clauses in its contracts were in any way applicable. See, e.g., Letter from Northern to Horizon Oil & Gas (Sept. 4, 1984) (form letter proposing contract amendments), *reprinted in* J.A. at 1970. Indeed, Northern acted the same as to contracts with clauses expressly referring to congressional price ceilings -- clauses that, while inconsistent with the language of 18 CFR § 154.93(b-1), the Commission had expressly found effective in Order No. 23. See Initial Decision, 43 FERC at 65,163; see also FERC Stats. & Regs. at 30,315. Moreover, Northern's price-reduction efforts focused heavily on gas that was deregulated as of January 1, 1985, and on which area rate clauses could have no effect. Even in the case of contracts that could be affected by area rate clauses, petitioners have uncovered no effort by Northern to justify its price cutback moves by a revisionist approach to those clauses. There is ample evidence to support the Commission's conclusion that the cutbacks were implemented not in reliance on the clauses but in spite of them. See Order, 48 FERC at 61,652; Initial Decision, 43 FERC at 65,163. Finally, petitioners' argument would seem to eliminate course of performance evidence from contract disputes. Some sort of resistance to past performance, on one side or the other, would seem a prerequisite to a dispute's ever landing in court. If performance is automatically negated by later resistance, then it is hard to imagine a case it would help resolve.

For their claim that the pre-1985 performance was variable, petitioners point to Northern's refusal to pay the special "tight sands" ceiling prices authorized by the Commission pursuant to § 107(c)(5) of the NGPA. But from the moment the Commission established the "tight sands" rate, it reasoned that the rate could only function as an incentive for producers to increase production of such gas if it was available only where

it was "a negotiated contract price"; FERC thus rejected reliance on a mere indefinite price escalator. See 18 CFR §§ 271.701-.703 (1990); see also *Pennzoil Co. v. FERC*, 671 F.2d 119 (5th Cir. 1982) (upholding the requirement); *Midwest Gas Users Ass'n v. FERC*, 833 F.2d 341 (D.C. Cir. 1987). In refusing to treat area rate clauses as justifying the tight sands rate, Northern merely hewed to the Commission's line.

The other alleged exception is the refusal of Northern's affiliate, Peoples Natural Gas, to pay NGPA rates (except for gas under § 104 of the NGPA) -- the conduct that led to the hearings in the first place. The ALJ found, however, that Peoples, a local distribution company regulated by state authorities, not by FERC, acted as it did because of concerns peculiar to its regulatory environment. In particular, Peoples feared (and later events proved) that Kansas regulators would refuse to allow it to pass NGPA rates through to its customers. See Initial Decision, 43 FERC at 65,166-67. The ALJ also found that the decisionmaking of the two affiliates was largely independent on the issue, a finding backed by substantial evidence. See *id.* at 65,167-68. Thus the course of performance evidence for the period prior to Northern's general effort to cut its gas costs back appears essentially unqualified.

Petitioners devote much of their brief to various witnesses' testimony that the intent of the clauses was just what they said (see, e.g., Brief for Petitioner at 54-58), that "just and reasonable" rates referred only to rates set by the Federal Power Commission (Brief for Petitioners at 51), and that the parties intended to conform to the Commission's requirements in 18 CFR § 154.93(b-1) (Brief for Petitioners at 58-60), and to documentary evidence of similar import (Brief for Petitioners at 45-49). If the issue were truly one of historical intent, these might be telling blows. But when the problem is viewed as one of how to fill a contract gap -- how to address a circumstance

that the contract plainly omitted -- the statements look irrelevant and even tautological.

We note that even petitioners' literalism has bounds. Even though the escalation clauses conforming to the language of 18 CFR § 154.93(b-1) could refer only to *area* rates, petitioners appear not to read them as excluding coverage of the *national* rates that the Commission started to promulgate in 1974. See Opinion No. 699, 51 FPC 2212 (1974). Nor, even for clauses referring only to the Federal Power Commission, do petitioners read them as excluding coverage of rates set by FERC after its creation in 1977. [2] While this is not necessarily a case of straining at a gnat after swallowing a camel, it leaves us puzzled as to petitioners' principle of construction.

The petitioners also point to testimony suggesting rather obliquely that Northern would not have agreed to price escalator clauses that would require it to "pay even if its customers won't pay Northern for the gas", see J.A. at 983; Brief for Petitioners at 53, *i.e.*, if the escalated price exceeded what Northern's customers were willing to pay. Indeed, as Congress obviously cannot reexamine natural gas pricing as frequently as a regulatory commission, the shift to statutory ceilings carried the risk that the ceilings would outrun the market, as in fact occurred. But that shift also contained the risk of ceilings well below market-clearing prices. As the ceilings would bind if they were below market, at the expense of producers, it is hardly surprising for the parties to have agreed that pipelines should bear the opposite risk.

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[2] See Department of Energy Organization Act, Pub.L. No. 95-91, 91 Stat. 565 (1977), terminating the FPC and replacing it with FERC.

Moreover, the ALJ reasoned that pipelines would be more concerned with the *average* price of gas than with the risk of some above-market purchases. See Initial Decision, 43 FERC at 65,158. The point is quite correct: interstate pipelines, operating under average-cost price regulations, do not "lose" the difference between the cost and selling price of a unit of gas (bought for more than the selling price), as would an unregulated firm; the above-average unit is "rolled" into the average, i.e., it gives the pipeline legal authority to charge a higher price. See *Id.* FAnd, if rate regulation has held the pipeline's rates to a relatively inelastic portion of its demand curve, materially below the level that would maximize its profits in an uncontrolled market, the pipeline will be able to charge the higher lawful rate with only a limited offsetting reduction in sales. An unregulated firm, by contrast, would presumably charge profit-maximizing rates anyway, and any purchase at a price above that rate would simply cost it money.Further, the Commission's analysis of the effect of area rate clauses leaves untouched any price-reduction claims and any defenses to non-performance that a pipeline might assert under other clauses of the contracts (such as market-out clauses) or under general contract doctrines (such as impracticability). Finally, petitioners have framed the argument as a general one that appears to dispute the basic premises of Order No. 23 -- the sort that we have ruled out as a collateral attack on Order No. 23. *Associated Gas Distributors v. FERC*, 810 F.2d 226, 231-33 (D.C.Cir. 1987).

The last of petitioners' claims that is marginally worthy of discussion is their suggestion that Northern and the producers did not meet their burden for the numerous contracts as to which no *producer* witness testified (what petitioners call the problem of "non-appearing producers" or "NAPs"). The petitioners' idea appears to be that there is a failure of evidence as to such contracts. But the testimony of the Northern witnesses encompassed all the contracts, as did the course of performance

evidence. The 56 producer witnesses confirmed Northern's picture (as was to be expected in view of the producers' interest in escalated prices). In the absence of some hint that matters were different for *any* other producer, there was no reason for the ALJ to acquiesce in petitioners' effort to further bloat the proceedings. Compare *Pennzoil Co. v. FERC*, 789 F.2d at 1145 n. 44; see also Order No. 23-B, FERC Stats. & Regs. ¶ 30,065 at 30,453-55 (anticipating pipeline-by-pipeline review of protests, with initial submission of evidence only by pipelines).

Finding substantial evidence in support of the Commission's orders, we deny the petitions for review.

So ordered.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Docket No. GP80-43-019

Order Denying Rehearing

(Issued March 9, 1990)

Before Commissioners: Martin L. Allday, Chairman; Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

On September 1; 1989, the South Dakota Public Utilities Commission and the Peoples Natural Gas Company, jointly, and Minnesota Public Utilities Commission (collectively, petitioners) filed requests for rehearing of the Commission's order affirming Initial Decision issued herein on August 2, 1989.[1] Each argues that the Commission's decision is contrary to the record evidence and case precedent. This order denies the requests for rehearing.

Background

This is a third-party protest proceeding conducted pursuant to the Order No. 23 series of rulemakings.[2] It involves the proper interpretation of area rate clauses in more than 1200 natural gas purchase contracts executed prior to

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[1] 48 FERC ¶ 61,177 (1989).

[2] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979), *aff'd in part and modified in part, Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (*Pennzoil I*).

passage of the Natural Gas Policy Act of 1978 (NGPA) between Northern Natural Gas Company, Division of Enron Corp. (Northern) and various producers (Producers) (collectively, Parties).

In November 1979 the Minnesota and South Dakota Public Utility Commissions (PUCs) and the Commission staff (collectively, Protestors) objected to the Parties' claim that area rate clauses authorized Northern to pay ceiling prices established by the NGPA for certain categories of gas subject to the Commission's jurisdiction.

The precise issue is whether the Parties intended area rate clauses to trigger payment of NGPA ceiling prices when the contracts at issue were entered into.[3] The Parties agree that they had such an intent. Under Order No. 23 third-party protest procedures, where the contracting parties agree that an area rate clause was intended to authorize collection of ceiling prices under the NGPA there is a presumption in favor of their interpretation. Third-party protesters have the burden to produce reliable and probative extrinsic evidence which specifically contradicts the parties' intent in order to rebut this presumption.[4] Once that burden is met, the presumption disappears, and a hearing is required at which the contracting parties have the burden of proof to establish that their mutual intent at the time of contract execution was that the area rate

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[3] *Northern Natural Gas Company*, 33 FERC ¶ 61,355, at p. 61,706 (1985).

[4] *Associated Gas Distributors v. FERC*, 810 F.2d 226, 228 (D.C. Cir. 1987).

clauses in issue would allow for payment of NGPA ceiling prices.[5]

In this case, Protestors primarily relied upon a pleading filed by Peoples Natural Gas Company (Peoples), an affiliate of Northern, in a Kansas declaratory judgment action involving interpretation of an intrastate area rate clause in Peoples' contracts (Kansas action).[6] Peoples averred that any price escalation under the area rate clause was limited to administratively established cost-based rates. The Commission held that without regard to whether Peoples and Northern operated independently, Peoples' position that the area rate clause in its contracts -- identical to one of Northern's area rate clauses -- was not intended to authorize NGPA rates, "could be considered reliable and probative extrinsic evidence to contradict the interpretation given to that clause by Northern."[7] Accordingly, the matter was remanded for a hearing on the merits. The intention of the parties in agreeing to area rate clauses was the issue set for hearing.

At the hearing, Protestors called no witnesses and so were limited to cross-examination of the Parties' witnesses. Protestors cross-examined fourteen Northern witnesses and fifty-six Producer witnesses. After observing and listening to the witnesses at the hearing, and upon reviewing the proffered but

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[5] *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (Pennzoil I).

[6] *McCoy Petroleum Co. v. Peoples Natural Gas Co.*, No. 80-1571 (D. Kan. 1980).

[7] 33 FERC ¶ 61,355 (1985), *reh'g denied*, 34 FERC ¶ 61,261, at p. 61,455 (1986).

not introduced testimony of the remaining fifty-eight Producer witnesses, the Presiding Judge determined that there was no point in requiring those witnesses to testify since no new information would be elicited from them. The presiding judge concluded that at the time they entered into the contracts the parties intended the area rate clauses "to trigger payments of all generally applicable ceiling prices established by federal authority."[8] The Commission's order of August 2, 1989, affirmed the Initial Decision and dismissed the protests noting that the court's ruling in *Hunt*[9] had disposed of most of the Protestors' exceptions.[10]

Requests for Rehearing

The requests for rehearing present no new arguments or analyses which were not previously considered in this proceeding. Both the Initial Decision and the order approving the Initial Decision were lengthy and thorough. No purpose would be served by repeating those discussions here. However, further explication may be in order on several issues, which we note below.

Petitioners renew their argument that *Pennzoil I* requires that evidence be produced and findings be made on a contract-by-contract basis.

Petitioners continue to argue that the course of performance supports their contention that the area rate clauses did not allow NGPA prices. Petitioners point out that the

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[8] 43 FERC ¶ 63,015 (1988).

[9] *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988).

[10] 48 FERC at p. 61,651.

highest authorized NGPA price was not consistently paid under the contracts.

Petitioners further argue that the judge erred as a matter of law by not attributing to Northern the position taken by Peoples in the Kansas action as to the intent in entering into area rate clauses. Petitioners point out that Peoples was a division of Northern and shared certain key personnel and argue that the two companies could not act independently.

Finally, Petitioners claim that the judge's ruling that he credited the Parties' evidence as to intent and that "Protestors have not introduced even a scintilla of direct evidence to the contrary" is fatally flawed because he held "evidence elicited on cross-examination is not substantive evidence."[11] This they assert is clearly erroneous and they allege that the judge ignored reliable evidence elicited from various witnesses on cross-examination.

Discussion

We find nothing in *Pennzoil I* to support Petitioners' contention that there must be a finding on a contract-by-contract basis. *Pennzoil I* held that, in spite of a general rule that area rate clauses could be sufficient authority to collect NGPA prices, whether or not price escalator clauses provided for NGPA maximum prices is an issue which should be decided on a case-by-case basis. The court did not find that a contract-by-contract review was required. By the term "case-by-case," the court was referring to individual controversies. There is no language which supports the petitioners' reading of *Pennzoil I* that each contract involved in a controversy must be physically produced and individually contested. Here, the case in controversy

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[11] 43 FERC at p. 65,148.

involves several types of contracts and the judge considered testimonial evidence from Northern (a party to all the contracts) and other evidence sufficient to establish the parties' understanding of area rate clauses in those contracts.

Northern paid NGPA ceiling prices from December 1978 to 1985. The fact that the highest possible authorized NGPA price may not always have been paid under the contracts does not answer the question at issue, which is whether the parties intended the escalation clause to authorize NGPA prices or only the just and reasonable area rates set by the Commission. Any payment based on NGPA rates supports the Initial Decision -- even if the rate was not the maximum allowable NGPA rate. The argument that Northern and producers did not agree to the collection of higher prices under special relief pricing does not refute the intent to pay NGPA prices in general. Further, the fact that after 1985 Northern ceased paying the NGPA section 108 ceiling price does not undermine the conclusion that the course of performance supports the Parties' interpretation of their area rate clause. As the prior order noted, Northern's action was similar to that of many other interstate pipelines who at that time sought to reduce the cost of the gas they were purchasing. Moreover, Northern's action in 1985 was unilateral since a number of producers commenced suit asserting that Northern's action was in breach of contract. Under *Hunt*, Northern's unilateral action does not contradict the prior course of conduct which confirmed the Parties' mutual intent in entering into the area rate clause.

In reaching the decision that the Protestors had submitted sufficient evidence to prevent summary dismissal, the Commission found that, because of common control, Peoples' statements as to the meaning of the area rate clause which differed from Northern's stated interpretation, had rebutted Northern's interpretation with "reliable and probative extrinsic

evidence."[12] However, this finding does not dispose of the issue of what was Northern's intent. The focus of the Commission in the prior proceeding was on the issue of whether Protestors had submitted sufficient evidence to rebut the presumption so a hearing was justified. The Commission found that Peoples' position statements met this burden. However, that did not, nor could it, constitute a finding as to the meaning of Peoples' contract, nor whether that meaning was also applicable to Northern's contracts.

All evidence -- contract language, oral and written extrinsic evidence and evidence of the course of performance -- must be weighed to determine the parties' intent.[13] In *Hunt*, the court found that course of performance evidence had "controlling weight."[14] The evidentiary weight of Peoples' statements made in a defensive posture as part of an answer to a complaint, is insufficient to overcome the weight of the evidence of the course of performance by Northern in paying the NGPA price.

Though the judge reached his conclusion after reviewing documentary and testimonial evidence,[15] the Commission

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[12] 33 FERC at p. 61,706.

[13] 853 F.2d at 1237, citing to *Pennzoil Co. v. FERC*, 789 F.2d 1128 at 1141 (5th Cir. 1986)(Pennzoil II).

[14] 853 F.2d at 1237.

[15] The order stated: In reaching his conclusion the judge reviewed and discussed the applicable legal standards; the language of the area rate clauses; the testimony of mutual intent

(continued...)

disagrees with the judge's statement concerning the evidentiary value of testimony elicited on cross-examination. Therefore, the Commission has reviewed the record including the pleadings and evidence elicited on cross-examination. The Commission finds convincing evidence supporting the ultimate finding that the Parties had carried the burden of establishing their interpretation that the area rate clause authorized NGPA rates.

The Commission orders:

The requests for rehearing in this docket are denied.

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[15](...continued)
by Northern and by the producers; the course of dealing under the commercial and regulatory context; the course of performance under the commercial and regulatory context both pre- and post-NGPA; the usage of trade; and the "Peoples evidence" (Peoples' intent and the effect of Peoples' intent on Northern). In the course of this analysis, the presiding judge evaluated the record evidence and credited the parties' witnesses. 48 FERC at p. 61,649.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Division of InterNorth, Inc., Docket No. GP80-43-009 (Phase I)

Order Affirming Initial Decision

(Issued August 2, 1989)

Before Commissioners: Martha O. Hesse, Chairman; Charles G. Stalon, Charles A. Trabandt, Elizabeth Anne Moler and Jerry J. Langdon.

[Note: Initial Decision of the presiding administrative law judge issued May 11, 1988, appears at 43 FERC ¶ 63,015.]

This is a case specific application of the third party protest procedures under Order No. 23.[1] It specifically relates to the proper interpretation of area rate clauses contained in natural gas purchase contracts between Northern Natural Gas Company (Northern) and various producers (producers) (Northern and producers called the parties) prior to the passage of the Natural Gas Policy Act of 1978 (NGPA). After a hearing, the presiding judge concluded that the parties had established that at the time they entered into the contracts they intended the area rate clause "to trigger payments of all

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[1] Order No. 23, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040 (1979) ("Order No. 23"), *aff'd in part and modified in part, Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) ("*Pennzoil I*").

generally-applicable ceiling prices established by federal authority."[2] We affirm the initial decision, dismiss the protests and terminate the proceeding.

Background

Under the Natural Gas Act (NGA), a producer could only collect the just and reasonable rate established by the Federal Power Commission and then the Federal Energy Regulatory Commission (both referred to as the Commission) in rate proceedings. These rates were initially established for individual producers, then by areas, *In re Permian Rate Case*, 370 U.S. 747 (1968), and eventually on a nationwide basis, *Shell Oil Co. v. FPC*, 520 F.2d 1061 (5th Cir. 1975), cert. denied, 426 U.S. 941 (1976).

Moreover both under the NGA and the NGPA any rate increase has to be contractually authorized. Accordingly, "indefinite price escalator clauses" were included in gas purchase contracts to permit the producer to collect any higher price established by the Commission whereby specified events would trigger price rises to a level determined by the particular event. The Commission, by regulation, rejected most clauses of this sort as contrary to the public interest, *see* 18 C.F.R. § 154.93 (1986), but did not invalidate clauses that tied the contract price to the "area rate" the Commission periodically established. *Id.* When the Commission shifted from area ratemaking to national ratemaking, it continued the earlier treatment by reading the area rate clauses as national rate clauses. *See Pennzoil I* at 367.

Shortly after Congress passed the NGPA, which provided for Congressionally set rates promulgated by Congress, the

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[2] 43 FERC ¶ 63,015 (1988).

Commission issued interim regulations expressing the tentative position that a pre-NGPA area rate clause in an interstate contract did not provide contractual authority to collect NGPA ceiling rates.[3] However, within a short time, the Commission issued Order No. 23 in which it found that in enacting the NGPA Congress did not intend to preclude payment of NGPA rates under area rate clauses. Instead, the Commission ruled that whether or not a particular area rate clause supports payment of NGPA rates turns on a question of the parties' intent.[4]

Under Order No. 23, the Commission required pipeline purchasers to file evidentiary submissions under section 154.94 of the regulations, 18 C.F.R. §154.94, which listed the contracts for which NGPA rates were claimed, the area rate clause at issue, and the pipeline's position on the claimed entitlement to NGPA rates under the area rate clause. Where the parties to the contract agree that an area rate clause was intended to authorize the collection of the maximum lawful price (MLP) under the NGPA there is a presumption in favor of the parties' interpretation. Third parties seeking to refute the parties' mutual statement of intent were required to file protests containing reliable and probative evidence which, if true, would contradict that stated intent.[5]

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[3] Interim Regulations Implementing the Natural Gas Policy Act of 1978 and Regulations under the Natural Gas Act, *FERC Statutes and Regulations, Proposed Regulations 1977-1981* ¶ 32,008 at p. 32,072 and p. 32,074 (1979).

[4] *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040, at pp. 30,309-15.

[5] Order No. 23-B, *FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065 (1979).

In August 1979, Northern filed its evidentiary submission which affirmed its intent and that of its producer-suppliers that the area rate clauses in approximately 1200 interstate contracts were intended to authorize the payment and collection of the highest applicable regulated rate, necessarily including ceiling rates established under the NGPA. On November 13, 1979, the Minnesota Public Utilities Commission (Minnesota PUC) and the South Dakota Public Utilities Commission (South Dakota PUC) filed third-party protests. The Commission Staff ("Staff") also filed a third-party protest on November 21, 1979. All protests relied exclusively on the language of the Northern producer's area rate clause. Staff later supplemented its protest with a pleading filed by Peoples Natural Gas Company ("Peoples"), an affiliate of Northern, in a Kansas declaratory judgment action involving interpretation of an intrastate area rate clause.[6] In that case Peoples averred that any price escalation

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[6] Until May 1952, Peoples was a wholly owned subsidiary corporation of Northern, when it became an operating division. From May 1952 until a change in corporate name in March 1980, Northern conducted its interstate pipeline operations through its wholesale operating division and its retail distribution operations through its intrastate operating division, Peoples. After the corporate name change, interstate pipeline operations were conducted through Northern Natural Gas Company, Division of InterNorth. Peoples, as a division of InterNorth, conducted local distribution. InterNorth changed its name to Enron Corporation in April, 1986. Peoples was divested in 1980. In 1985 UtiliCorp United Inc. purchased Peoples. Thereafter, Peoples Natural Gas Company filed a petition to intervene out-of-time as a third-party protestor in this proceeding. To avoid confusion, Peoples Natural Gas Company as a third-party protestor is referred to herein as "PNGC,"

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under the area rate clause was limited to administratively established cost-based rates.[7]

On August 31, 1983, the Presiding Judge issued an order phasing the case to test the "threshold issue" of whether the protests contained reliable and probative evidence of Northern's intent such that further proceedings would be necessary.[8] On August 10, 1984, the Presiding Judge issued an Initial Decision finding that the Protestors' evidence was not reliable and probative evidence which contradicted the parties' mutual statements of intent; therefore, no further hearings were necessary.[9] The Commission reversed[10] stating that without regard to whether Peoples and Northern operated independently, Peoples' position that the area rate clause in its contract--identical to Northern's area rate clause--was not intended to authorize NGPA rates, "could be considered reliable and probative extrinsic evidence to contradict the interpretation given to that clause by Northern."[11] Accordingly the matter was

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[6](...continued)
whereas Peoples Natural Gas Company prior to 1985 is referred to herein as "Peoples." All four active third-party protestors are referred to as "Protestors."

[7] *McCoy Petroleum Co. v. Peoples Natural Gas Co.*, No. 80-1571 (D. Kan. 1980).

[8] 24 FERC ¶ 63,085 (1983).

[9] 28 FERC ¶ 63,028.

[10] 33 FERC ¶ 61,355 (1985), *reh'g denied*, 34 FERC ¶ 61,261 (1986).

[11] *Id.* at p. 61,455.

remanded for a hearing on the merits. The intention of the parties in agreeing to the area rate clause was the issue set for hearing.

At the outset of the hearing the judge ruled that NGPA sections 104 and 106(a) contracts were at issue, producer intent remains established as a rebuttable presumption, and that certain specific types of area rate or other clauses were or were not at issue, depending upon discovery. The hearing commenced on November 12, 1986. Fourteen Northern witnesses and 56 producer witnesses testified and were subjected to extensive cross-examination.[12] Approximately 58 producers who had submitted prepared testimony did not testify following the presiding judge's ruling that their testimony would be cumulative. Protestors did not file testimony.[13]

On May 11, 1988 the judge issued his decision dismissing the protests and terminating the proceeding. In reaching his conclusion the judge reviewed and discussed the applicable legal standards; the language of the area rate clauses; the testimony of mutual intent by Northern and by the producers; the course of dealing under the commercial and regulatory context; the course of performance under the commercial and regulatory context both pre- and post-NGPA; the usage of trade; and the "Peoples evidence" (Peoples' intent and the effect of Peoples' intent on Northern). In the course of this analysis, the presiding judge evaluated the record evidence and credited the parties' witnesses. Briefs on Exceptions were filed by Staff,

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[12] There are approximately 5400 pages of transcript.

[13] The judge accepted into evidence numerous exhibits proffered by protestors and expressly limited the use of those exhibits for impeachment purposes.

South Dakota PUC, Minnesota PUC and PNGC. Briefs opposing exceptions were filed by Northern and Producers.

Discussion

In order to assess the validity of the arguments raised by protestors we shall briefly discuss the applicable legal standard. This proceeding is a third-party protest, subject to the Order No. 23 series of rulemakings. The parties to the contract agree on their intent under the area rate clause and thus there is a rebuttable presumption in favor of that interpretation. However, because of the existence of the Peoples evidence, the Commission found that Protestors had satisfied the burden of coming forward with reliable and probative extrinsic evidence to contradict that interpretation. Thus a hearing on the merits was ordered at which the parties to the contract have the burden of proof to establish their intent. Under *Pennzoil II*,[14] the Commission:

> is obligated to construe the contracts to determine whether they authorize NGPA rates or not, taking into account the language of the contracts and *all* the extrinsic evidence of intent presented, including the parties' assertion of mutual intent.[15]

This is so because if a hearing is required, only the presumption disappears, and not the evidence from which the presumption arises, which was still entitled to evidentiary weight. Moreover, in making its factual determinations after the presiding judge's

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[14] *Pennzoil Co. v. FERC*, 789 F.2d at 1128 (5th Cir. 1986).

[15] *Id.* at 1141 (emphasis in original).

initial resolution of the parties' intent, the Commission, while not strictly bound by the judge's credibility determinations, is to afford the credibility findings of the presiding judge special weight, and such findings are not to be easily ignored.[16]

To date, of all the Order No. 23 proceedings, only this one, and one other, involving United Gas Pipe Line Co. (United), Docket No. GP80-41 have required a hearing. The court rulings in the *United* case support the conclusion we reach here. Accordingly, we shall review that case and the application of the rulings therein to this case.

In that case, after United had filed the evidentiary submission under Order No. 23 to permit collection of the NGPA rate, third parties filed protests. The crucial evidence was an April 23, 1979 letter from United to producers stating it did not believe the area rate clause was intended to authorize paying the NGPA section 108 prices for stripper well gas.[17] United stated that when the area rate clauses were entered into the rate of production was never a criterion for determining the pricing category of gas and thus it could not have intended to pay the higher stripper well price by entering into the area rate clause. In August 1979 United retracted the April letter, and paid the section 108 price to producers for the stripper well gas.

A hearing was ordered to determine the parties' intent with respect to stripper well gas because the Commission held that the April 23 letter was "reliable and probative extrinsic

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[16] *Id.* at 1145 n.44.

[17] Stripper wells are wells producing less than 60 Mcf per production day. 15 U.S.C. § 3318(b) (1982).

evidence" contradicting the mutual intent of the parties.[18] The presiding judge found there were eight distinct types of clauses in the 775 various gas contracts at issue. Construing the language together with the extrinsic evidence he concluded that two types of the clause, Type I and IV did not authorize collection of the section 108 rate, but that the other six did. The Commission reversed and held that there was contractual authorization only as to one type of clause, Type VIII.[19] The Commission stated that the April 1979 letter effectively negated the parties' mutual assertions of intent, so that the contract language was no longer controlling, and the parties had the burden of proving intent based upon the extrinsic evidence, which burden they had not met.

In *Pennzoil II* the Court vacated and remanded the case because it found that the Commission had erred as to the nature and consequences of the presumption under Order No. 23. The presumption merely shifts the burden of the parties' evidence with respect to the presumed fact, which in this case was the parties' mutual intent to authorize NGPA rate. Once the presumption disappears because Protestors had introduced extrinsic evidence rebutting the presumption, the factual issue

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[18] 11 FERC ¶ 63,018 (1980), *remanded*, Opinion No. 135, 17 FERC ¶ 61,232 (1981), *reh'g denied*, Opinion No. 215-A, 28 FERC ¶ 61,018 (1984), *aff'd*, *Associated Gas Distributors v. FERC*, 810 F.2d 226 (D.C. Cir. 1987). Payment of the other NGPA rates was permitted because United's April 1979 letter related only to section 108 gas.

[19] Opinion No. 181, 24 FERC ¶ 61,083 (1983), *reh'g denied*, 27 FERC ¶ 61,199 (1984).

is to be resolved at a hearing.[20] The court found that the Commission's analysis deviated from this standard because (1) it failed to give any further evidentiary weight to the parties' assertion of mutual intent; (2) it gave undue weight to Protestors' rebuttal evidence which was the April 1979 letter, and (3) it refused to give evidentiary weight to the language of the contracts. On remand, the Commission adopted the presiding judge's initial decision, in which he concluded that clauses Types I and IV did not authorize collection of NGPA rates but that all the other types did.[21] The Commission reasoned that but for its misapprehension of the Order No. 23 presumption, it would have adopted that decision originally, and it was now adopting the decision on remand.

Upon appeal, the court reversed and directed the Commission to enter a final order as to Type I clause as also authorizing the NGPA rate.[22] The court found that the presiding judge had in effect disregarded the extrinsic evidence of intent which he found was ambiguous and instead had relied solely on the contract language "as the only reliable evidence of the parties' intent".[23] That language he concluded did not authorize the NGPA rate. The court stated that because of the

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[20] The court characterized the approach as the Thayer "bursting bubble" theory of presumption. *See* 789 F.2d at 1136-37.

[21] 40 FERC ¶ 61,062 (1987).

[22] *Hunt Oil Co. v FERC*, 853 F.2d 1226 (5th Cir. 1988) (*Hunt*). No appeal was taken as to Type IV, which apparently was contained in only one contract.

[23] 853 F.2d 1226 at 1237, *citing* 20 FERC ¶ 63,050, at p. 61,226 [sic] p. 65,226.

presiding judge's "failure to acknowledge the controlling weight of this substantial evidence"[24] as to the course of performance, the Commission's decision was not supported by substantial evidence and had to be vacated. Furthermore, the court agreed with producers that whatever the significance of the April 1979 letter, United's August 1979 retraction letter, and United's payment of the NGPA rate thereafter, constituted modification of the contract, which further supported the conclusion that payment of NGPA rates was intended. The court held that even if United's motive in sending the August letter was a desire to maintain good relations with the producers, as the Commission reasoned, that would not preclude a finding that there had been a modification. Moreover, the parties' "consistent and unbroken performance subsequent to the August retraction letter in paying and receiving and retaining the higher NGPA rate for the stripper well gas" was "the most compelling corroborations evidence of the contract modification."[25] Consistent with the court's directive, the Commission issued an order that producers were entitled to collect the NGPA section 108 rate on Type I clauses, as well as the other types of clauses.[26]

Hunt mandates that we affirm the initial decision. But even apart from *Hunt* we would have reached that determination. To place the exceptions in the proper perspective,[27] we shall briefly note the analysis adopted in the initial decision and show

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[24] 853 F.2d at 1237.

[25] *Id.* at 1239-40.

[26] *United Gas Pipe Line Co.*, 46 FERC ¶ 61,370 (1989).

[27] The exceptions total more than 500 pages.

how it meets the *Hunt* standard, and then review the exceptions that require discussion after *Hunt*.

The judge first looked at the contract language. He found that none of the clauses restricted the ability to collect NGPA rates and the particular words were unimportant because the parties changed the area rate clause's wording to be consistent with the Commission's regulations.[28] Thus there had to be an evaluation of the extrinsic evidence to determine the parties' mutual intent. The parties offered witnesses who maintained that the area rate clauses "represented Northern's intent to pay the highest prices allowed by law or regulation." Protestors offered no witnesses but sought to impeach the parties' witnesses. However the judge was satisfied that the testimony of the parties' witnesses should be credited even though a witness may have had less than complete knowledge.[29]

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[28] *Supra*, p. 2. Moreover, the Commission has held that use of the words "just and reasonable" in an escalation clause is subject to conflicting interpretation because it could have been used to mean the "maximum legally permissible prices, since said prices were required to be just and reasonable under the governing statutes then in effect . . ." Opinion No. 77, 10 FERC ¶ 61,214, at p. 61,397 (1980).

[29] None of Protestors' exceptions challenging the presiding judge's credibility determination has merit. We should note that in *Pennzoil II*, the court stated (789 F.2d at 1141):

> In large measure, this ultimate resolution involves a fact question that turns on credibility determinations. The Commission must make those difficult credibility determinations and

(continued...)

Moreover the parties' course of performance both pre-NGPA as well as post-NGPA showed that both Northern and producers treated area rate clauses as triggering payment of the applicable ceiling price. The judge also reviewed the Peoples' evidence to see if it refuted the parties claimed intent.

The court's ruling in *Hunt* disposes of most of Protestor's exceptions because the course of performance is "controlling weight of ... substantial evidence of the parties' intent"[30] and the judge found that both pre-and post-NGPA, Northern paid the applicable ceiling price established by the federal

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[29](...continued)

> answer the factual inquiry as did the ALJ in this case. It is simply unacceptable for the Commission to avoid the determination by stating that the producers procedurally failed to adduce sufficient evidence to sustain their burden of proof. As a matter of law, the amount of evidence presented by the producers, if believed, amply demonstrated contractual authorization under the contracts.

[30] *Hunt*, *supra* at 1237.

regulations.[31] We shall briefly address Protestors' exceptions as to the course of performance.

With respect to the pre-NGPA period, Protestors argued that since Northern did not pay the rates established by the NGA special relief procedures, this demonstrated that Northern did not intend to pay the highest applicable rates and thus could not have intended the area rate clause to authorize the NGPA rates. The judge found no merit in this because the special relief procedures were exactly what the name connoted-special procedures. Those procedures permitted payment above the ceiling price but required a party to file for it on an individual basis. In their exceptions, Protestors continue to refer to Northern's refusal to pay the higher special relief rates under the area rate clause. We agree with the judge's conclusion that the special relief rate is not relevant to the area rate clauses. That Northern did not pay the special relief rate has no bearing on the parties' intent in entering into area rate clauses because the special rate is a separate and distinct rate. A party could seek such relief without regard to whether its contract had an area rate clause.

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[31] Peoples' exceptions assert that Northern's actions in paying the NGPA prices were based in part on considering producer relations which would contradict the finding that the decision to pay NGPA prices was based on intent (Peoples Brief on Exceptions at 97). However, in *Hunt*, the court held, that "an intent by United to maintain a good working relationship with its producers does not preclude a finding that the parties did in fact modify their contract to provide for the collection of the NGPA rates..." 853 F.2d at 1238. It similarly follows that if Northern paid the NGPA rate, the fact that one element may have been a desire to maintain good relations with the producers does not eliminate the fact that the NGPA rate was in fact paid.

With respect to the post-NGPA period, apart from the Peoples' evidence, which we shall discuss separately, the major thrust of Protestors' exceptions relates to the judge's conclusion that Northern consistently paid the NGPA ceiling price after December 1, 1978.

Although Protestors argue that Northern did not always pay the NGPA rate,[32] they fail to substantiate that claim except as to the post-1985 prices. Staff argues that after enactment of the NGPA Northern directed its buyers not to agree to section 108 prices in new contracts. However, that in no way contradicts the judge's finding because that related to new contracts, not existing contracts. Similarly Staff's argument that Northern's refusal to pay NGPA section 110 add-ons to some producers demonstrates that Northern did not intend to authorize payment of NGPA ceiling prices has no merit. The Commission's regulations separate procedures for the recovery of certain production-related costs. Section 271.1104(c)(4)(ii)(B) provides for collection of certain production related costs under an area rate clause. However, an area rate clause is evidence only of the purchaser's willingness to compensate for delivery charge, but not for compression charges. Thus Northern's conduct with respect to section 110 add-on has no bearing on its intent with respect to authorizing NGPA ceiling prices.

Protestors also refer to Northern's pricing actions after January 1, 1985 in arguing that the judge erred, because those actions they contend, establish that Northern did not intend to authorize NGPA pricing when entering into the area rate clauses. First Protestors argue that the judge erred because of the

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[32] *See, e.g.* Staff Brief on Exceptions, at 98.

evidence of Northern's refusal to pay the Order No. 451 price.[33] If a contract had an area rate clause, the producer could utilize Order No. 451 [*FERC Statutes and Regulations* ¶ 30,701]. However, this did not automatically entitle the producer to the higher price. We agree with the judge's analysis that the procedure under Order No. 451 is similar to the negotiated contract issue under NGPA section 107. The area rate clause related to the price that would automatically apply because of an event or act of an outside party. We have held that while an area rate clause permits escalation to the NGPA price, it does not provide authorization for the tight sands price under NGPA section 107 absent the purchaser's agreement.[34] Thus, where a subsequent agreement is required to obtain a higher price, the refusal to enter into such agreement has no bearing on the issue of the original intent in entering into the area rate clause.

Protestors also point to Northern's conduct after January 1, 1985, when it paid less than the NGPA ceiling prices for gas still subject to price regulations, such as NGPA sections 102(d) and 108. The judge held that Northern, like many other interstate pipelines, was seeking to reduce the rates under its contracts because of the changed economic environment. There was no evidence that Northern was relying upon the area rate clause, but rather it was doing it in spite of the area rate clause

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[33] That order establishes for all vintages of gas under NGPA sections 104 and 106 an alternative maximum lawful price if the price is established under a contract executed after July 18, 1986 or the purchaser has agreed to pay the higher price under an existing contract.

[34] *See* Colorado Interstate Gas Co. (CIG), 45 FERC ¶ 61,293 (1988).

and that this conduct, in 1985, was not inconsistent with the parties' asserted intent when the area rate clause was entered into. Since Protestors concede that a number of producers commenced suit against Northern for breach of contract, it is clear that Northern acted unilaterally. Such unilateral action does not constitute mutual agreement as to the parties' intent in entering into the area rate clause.[35] Accordingly, we find no merit in Protestor's exceptions.

The Peoples' Evidence

The Peoples' evidence related to the position taken by Peoples after the NGPA became effective that the area rate clause in its intrastate gas contracts did not entitle the producer to NGPA prices except to the extent the higher prices were cost-based. Peoples, at that time a division of an interstate pipeline and an affiliate of Northern, maintained that position when producers sued for the higher price. The presiding judge originally had held that since Peoples and Northern operated independently, Peoples' statement could not be attributed to Northern. Moreover, even if it could, it was not reliable and probative extrinsic evidence because different contracts are involved and the circumstances giving rise to them were different. The Commission reversed finding that the evidence was sufficient to meet the Protestors' initial burden because if the judge had required a hearing to determine whether Peoples' intent could be ascribed to Northern, then *ipso facto* Protestors were entitled to a hearing under the Order No. 23 procedures. However, the Commission did not rule on the merits of the protest, stating "The intention of the parties in agreeing to this provision is precisely the issue set for hearing".[36]

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[35] *See Hunt, supra*, 853 F.2d at 1237.

[36] 33 FERC at p. 61,706.

After hearing, the judge held that the original intent of Peoples in entering into the area rate clause was to pay the same price for gas as the interstate price for gas. However, it took the position it did after enactment of the NGPA because of the uncertainty whether the state agency would permit a pass through of those higher prices. Moreover, whatever Peoples' initial position, the record showed that it paid the NGPA sections 104 and 106 prices if that price exceeded the fixed price in its gas purchase contract. The judge also held that regardless of what Peoples may have intended, that intent was not Northern's intent because the evidence established that they operated independently and in "different regulatory environments." Also there was no evidence to show that there was a "commonality of actions or policy".[37] Moreover, even if there was, and there was a conflict of views as to the area rate clause's meaning, there was no evidence Peoples could dictate to "its much larger corporate brother".[38] Thus, the Peoples evidence did not overcome the parties' position that they intended the area rate clause to authorize the NGPA prices.

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[37] 43 FERC at p. 65,168.

[38] *Id.* Northern's General Counsel, Mr. Wallace, noted Peoples' position in the May 26, 1981 Monthly Report. However, that letter stated that Northern's position, was that:

> Northern always has contended that the "area rate" clauses *do* trigger the payment by Northern of higher prices. All of Northern's actions as well as all of the pleadings filed on behalf of Northern in this proceeding have been consistent with this position. (Emphasis in original). (Exhibit P-R-5).

We find no error in the judge's reasoning and conclusions, particularly under the *Hunt* standard. In this case Northern never expressed a contrary intent. The only indication of a different intent emanated from Peoples, an affiliated company. Further, there is no evidence that Producers acquiesced in Peoples' position since legal proceedings were commenced between Peoples and their intrastate suppliers. These suits resulted in Peoples agreeing to pay the NGPA prices. Clearly, if in *Hunt* the court held that United's unilateral initial refusal to pay could not be conclusive as to the producer's intent, it follows that an affiliate's unilateral position could not determine the parties' intent. Moreover, since Peoples later agreed to pay the NGPA prices, this would negate any meaning that might be implied from the initial refusal to pay the NGPA prices.

The Commission orders:

The initial decision is affirmed and the protests are dismissed.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Northern Natural Gas Company, Docket No. GP80-43-005 (Phase I)

Order Reversing Initial Decision and Remanding to Administrative Law Judge

(Issued December 12, 1985)

Before Commissioners: Raymond J. O'Connor, Chairman; A. G. Sousa, Charles G. Stalon, Charles A. Trabrandt and C. M. Naeve.

[Note: Initial Decision of the presiding administrative law judge, issued August 10, 1984, appears at 28 FERC ¶ 63,028.]

Northern Natural Gas Company (Northern), an interstate pipeline which is now a division of InterNorth, Inc. (InterNorth), filed its evidentiary submission in the above-captioned Order No. 23 proceeding claiming that the area rate clause in its contracts with various producers entitled them to receive the higher prices permitted under the Natural Gas Policy Act of 1978 (NGPA). [1] In response, various third parties filed protests contending there was no such contractual authorization. The issue presented is whether protestors [2] have submitted sufficient evidence to prevent summary dismissal.

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[1] 15 U.S.C. §§ 3301-3432 (1984).

[2] Protestors are Commission Staff, Associated Gas Distributors (AGD) and the Minnesota Public Service Commission and the South Dakota Public Utilities Commission (PSCs).

Under the Commission's Order No. 23 rulemakings and subsequent cases clarifying that order's standards, [3] where the parties to the contract agree that the area rate clause was intended to authorize the collection of rates under the NGPA there is a presumption in favor of the contracting parties' interpretation. In order for third party protestors to obtain a hearing, and to avoid summary dismissal (absent contract language which a reasonable man would find precluded statutory rates), [4] they "must produce reliable and probative extrinsic evidence which negates the stated intent of the parties to the contract." [5] Resolution of the question of whether third parties have met this initial burden is significant, since at the hearing on the merits

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[3] See Order No. 23, Docket No. RM79-22 [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,040] (1979); Order on Rehearing of Order No. 23, 7 FERC ¶ 61,152 (1979); Order No. 23-A [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,058] (1979); Order on Rehearing of Order No. 23-A, 8 FERC ¶ 61,158 (1979); Order No. 23-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,065] (1979); Order on Rehearing of Order No. 23-B [*FERC Statutes and Regulations, Regulations Preambles 1977-1981* ¶ 30,073] (1979). The cases include, among others, Opinion No. 77, 10 FERC ¶ 61,214 (1980); Opinion No. 135, 17 FERC ¶ 61,232 (1981) (*Transco I*); Opinion No. 181, 24 FERC ¶ 61,083 (1983) (*United Gas*); Opinion No. 215, 27 FERC ¶ 61,180 (1984) (*Transco II*); and Opinion No. 181-A, 27 FERC ¶ 61,199 (1984).

[4] In this case, the language would not preclude the statutory rates.

[5] *United Gas, supra*, 24 FERC at p. 61,219.

the burden of proof is on the parties to the contract to establish their intent, as the presumption no longer governs. [6]

In March 1981, third parties supplemented their protests with statements by Peoples Natural Gas Company (Peoples) denying that its area rate clause authorized NGPA rates. Peoples is a division of InterNorth and has always conducted local gas distribution for the corporation. [7] Protestors contended that Peoples' statements constituted reliable and probative extrinsic evidence contradicting Northern's interpretation that its area rate clause was intended to authorize NGPA rates. The most significant Peoples' statement is found in an Answer which Peoples filed in September 1980 as a defendant in a Federal court suit filed by a producer, McCoy Petroleum Company (McCoy). McCoy claimed that it was entitled to receive from Peoples the higher NGPA prices under its 1973 intrastate contract with Peoples, since that contract contained an area rate clause. That clause was identical to the one that Northern relies upon in this

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[6] *See Pennzoil Co. v. F.E.R.C.*, 645 F.2d 360, 370 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982).

[7] Until May 1952, Peoples was a wholly-owned subsidiary of Northern, when it became an operating division. From May 1952 until a change in corporate name in March 1980, "Northern conducted its interstate pipeline operations through its Wholesale Operating Division and its retail distribution operations through its intrastate Operating Division, Peoples." (Exhibit 96, McCarthy testimony at 1. References to exhibits are those listed in Appendix A to the initial decision.) After the corporate name change, interstate pipeline operations were conducted through Northern Natural Gas Company, Division of InterNorth. Peoples, as a division of InterNorth, conducted local distribution.

case in claiming contractual authorization for the NGPA prices. In its Answer, Peoples stated that it "specifically denies that the enactment of the Natural Gas Policy Act of 1978 in any way triggered the quoted contract provision, nor is plaintiff in any way entitled to higher prices by reason of the enactment of the Natural Gas Policy Act of 1978 except to the extent those higher prices are cost based." [8] Peoples also averred in its Answer that the area rate clause "is clear and unambiguous and must be interpreted consistent with the clear intention of the parties, that is that price escalation thereunder is clearly limited to response to administratively established cost based rates, and consistent with the Kansas Natural Gas Protection Act and not otherwise." [9] Protestors also rely upon other statements by Peoples similarly disavowing that the area rate clause authorized collection of NGPA rates.[10]

The presiding judge rejected protestors' assertion that they had satisfied their initial burden to prevent summary dismissal, and instead ordered a hearing on the threshold issue of whether statements of Peoples could be attributed to Northern

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[8] Exhibit 81, ¶ 10.

[9] *Id.*, ¶ 12.

[10] *See, e.g.*, letter of May 3, 1979, Ex. 47. Protestors also rely upon a 1983 affidavit from a McCoy partner who had negotiated the McCoy gas contract with Peoples in 1973. He stated that the Peoples negotiator represented that the area rate clause in Peoples' intrastate contract was similar to the one in Northern's interstate contracts, and that it would entitle McCoy to receive "the same price as being received by producers making sales to pipelines which were engaged in interstate commerce." Exhibit 82.

in ascertaining Northern's intent. He allowed Northern to submit evidence on the operations of Northern and Peoples. Based upon all the evidence introduced he found that the "gas purchasing policies of neither division controlled those of the other," and that there was "no evidence that the expression of Peoples was considered, known, or adopted by Northern at the time it entered into the disputed clauses, and subsequent thereto, either prior to or after passage of NGPA." [11] He concluded that, for purposes of an Order 23 proceeding the Peoples evidence was not reliable and probative evidence sufficient to contradict Northern's stated interpretation.

The initial decision also held that, even assuming Peoples' statements could be attributable to Northern, the evidence submitted by protestors still would not be reliable and probative extrinsic evidence. Two different contracts are involved and the circumstances of the two are not the same. Thus, different interpretations could be given to the identical area rate clause. Accordingly, the presiding judge dismissed the protests, holding that the protestors had not met their initial burden.

Protestors filed exceptions urging that both the procedure followed and the conclusion reached by the presiding judge were erroneous. We agree with protestors that the presiding judge erred in holding that the protestors had not met their initial burden. Because the material upon which protestors rely did not emanate directly from Northern, the presiding judge stated that there was a threshold issue of whether Peoples' intent concerning the meaning of the area rate clause in its contract would automatically be ascribed to Northern. We believe that if the judge

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[11] *Northern Natural Gas Co.*, 28 FERC ¶ 63,028, at p. 65,087 (1984).

required a hearing to determine that issue, then *ipso facto* protestors had met their initial burden.

In *Transco I* we pointed out, as did the court in *Pennzoil*, [12] that for protestors to obtain a hearing on the merits, the evidence they submit need not be such that, if true, it would dispose of the case. It must merely be sufficient to rebut the presumption, since "[i]t was never the Commission's intention to present an insurmountable barrier to third party protestors" in Order 23 proceedings. [13] The submission by protestors in the instant matter of evidence that Northern and its local distribution company counterpart within InterNorth (Peoples) have different interpretations of identical area rate clauses satisfies the initial burden placed upon protestors. Peoples' interpretation of the contract language can be attributed to Northern because of common control, and thus Northern's interpretation has been rebutted with reliable and probative extrinsic evidence.

The presiding judge's reliance upon *Transco II* in reaching the conclusion that Peoples' admissions could not be attributed to Northern is misplaced. In that case, we held that the statement by one corporation, that the area rate clause in its contract did not authorize collection of a specified NGPA rate, was not binding upon a 50 percent-owned subsidiary. At all relevant times at issue in this proceeding, Northern and Peoples have been part of the same corporate entity. [14]

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[12] *See* n.6, *supra*.

[13] 17 FERC at p. 61,450

[14] In fact, some of the evidence submitted by protestors includes statements by Peoples prior to March 1980, when Peoples was a division of Northern.

We also disagree with the presiding judge's finding that Peoples' statements were not reliable and probative evidence, even assuming that Northern and Peoples are one entity, because the evidence related to a different contract, with differing circumstances. The possibility that identical contract language could express different contractual intent is insufficient to deny protestors a hearing. Protestors earned a right to a hearing on the merits by submitting evidence of admissions from within the same corporate entity that identical contract language could not permit NGPA pricing. The intention of the parties in agreeing to this provision is precisely the issue set for hearing.

We find that Peoples' statements are reliable and probative extrinsic evidence. Accordingly, we reverse the initial decision and remand the matter for a hearing on the merits.

The Commission orders:

A. The order issued in this docket on August 6, 1984, is reversed.

B. The exceptions of Commission Staff, Associated Gas Distribution and Minnesota Public Service Commission and the South Dakota Public Utilities Commission are granted to the extent indicated.

C. This proceeding is remanded to the Administrative Law Judge to hold a hearing on the merits.

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Natural Gas Act, 15 U.S.C. 717r.
Rehearings; court review of orders

(b) **Review of Commission order.** Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify

its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239, and 240 of the Judicial Code, as amended.

Natural Gas Policy Act, 15 U.S.C. § 3311 (Inflation adjustments; other price ceiling rules) (b) (Rules of general application)

> **(9) Effect on contract price.**--In the case of--
>
> (A) any price which is established under any contract for the first sale of natural gas and which does not exceed the applicable maximum lawful price under this subchapter, or
>
> (B) any price which is established under any contract for the first sale of natural gas which is exempted under part B of this subchapter from the application of a maximum lawful price under this subchapter,

such maximum lawful price, or such exemption from such a maximum lawful price, shall not supersede or nullify the effectiveness of the price established under such contract.

Natural Gas Policy Act, 15 U.S.C. § 3416
Judicial Review

* * *

(4) Judicial review.--Any person who is a party to a proceeding under this chapter aggrieved by any final order issued by the Commission in such proceeding may obtain review of such order in the United States Court of Appeals for any circuit in which the party to which such order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia circuit. Review shall be obtained by filing a written petition, requesting that such order be modified or set aside in whole or in part, in such court of Appeals within 60 days after the final action of the Commission on the application for rehearing required under paragraph (2). A copy of such petition shall forthwith be transmitted by the clerk of such court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of Title 28. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to such order of the Commission shall be considered by the court if such objection was not urged before the Commission in the application for rehearing unless there was reasonable ground for the failure to do so. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the

Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as the court deems proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive. The Commission shall also file with the court its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

18 C.F.R. § 207.205
Contractual authorization to collect NGPA rates

(a) Existing interstate contracts. In the case of an existing contract for a first sale of natural gas to which the Natural Gas Act applies:

(1) Any contractual provision for a change in price in such contract which by its terms specifically permits collection of NGPA rates or of maximum lawful prices prescribed by legislation, constitutes contractual authorization to charge and collect the NGPA rates applicable to such first sale.

(2) A contractual provision described in § 154.93 (b-1)(relating to area rate clauses), or similar provision generally will be considered to constitute contractual authorization to charge and collect an NGPA rate to the extent the parties intended to authorize charging and collection of one or more NGPA rates under the contract.

* * *

(c) Modification of contracts. The NGPA does not prohibit the parties to a contract for the first sale of natural gas from amending or modifying such contract to permit the seller to charge and collect any applicable NGPA rate or an adjustment under Subpart K of Part 271 for production-related costs or State severance taxes . . . .

(d) Definition. For purposes of this section, "NGPA rate" means maximum lawful price prescribed by or under the NGPA (including any price collection of which is authorized by Part 273) of this chapter.

No. 91-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION,
MINNESOTA PUBLIC UTILITIES COMMISSION,
and PEOPLES NATURAL GAS COMPANY,
a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NORTHERN NATURAL GAS COMPANY IN OPPOSITION

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January 17, 1992

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

RULE 29.1 LISTING

Northern Natural Gas Company's parent company, Enron Pipeline Company, is a subsidiary of Enron Corp. The following is a listing of subsidiaries (except wholly owned subsidiaries) of Enron Corp.:

Bannon International Limited

Citrus Corp.

Enron Arbross Ship Management Co. Ltd.

Enron/Dominion Cogen Corp.

Enron Oil & Gas Company

HT Gathering Company

Halton International Limited

Interruptores Especializados Lara, S.A.

Manufacturera de Aparatos Domesticos, S.A. (MADOSA)

Milford Power Limited Partnership

Mojave Pipeline Company

Mundogas Orinoco Limited

Norelf Limited

Oasis Pipe Line Company

San Marco Pipeline Company

Seagull Shoreline System Transmission Company

The Standard Shale Products Company

Tarumi Enterprises Ltd.

Teesside Gas Transportation Limited

Teesside Power Limited

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Petitioners,

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF NORTHERN NATURAL GAS COMPANY IN OPPOSITION

Northern Natural Gas Company ("Northern"), a respondent in the proceedings below, respectfully requests that this Court deny the petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit in *South Dakota Public Utilities Com'n* v. *F.E.R.C.*, 934 F.2d 346, *reh. denied*, 941 F.2d 1233 (1991).

REASONS FOR DENYING THE WRIT

The court of appeals correctly found that the orders of the Federal Energy Regulatory Commission ("FERC" or "Commission") are supported by substantial evidence. The decision of the court below does not conflict with any decision of this Court or of any other court of appeals. This case raises no constitutional issues, nor does it present any important federal question. Accordingly, further review by this Court is not warranted.

1. Petitioners' essential claim is that they were denied "basic due process rights to present evidence and argument addressing the standard by which their case would be judged." (Pet. at 8.) Yet, Petitioners cannot deny that they were fully aware that this case would involve examination of the contract language, the parties' testimony of mutual intent, the course of dealing, the course of performance and trade usage. Petitioners had a full opportunity to present whatever evidence or argument they deemed to be relevant to these factors. As noted by the court below, Petitioners had "extensive discovery, including two opportunities for the protestors [Petitioners] to review all of Northern's relevant files. . . ." (App. at 14a.) Further, 14 witnesses presented by Northern and 56 witnesses presented by producers "were cross-examined at length, producing a transcript of about 5,400 pages." *Id.* After years of opportunity to conduct a search, Petitioners failed to produce a single witness. *Id.*

Petitioners' claim that they were denied due process rests on their allegation that the "historical intent" test and the "reconstructed intent" test are "diametrically opposed" because "[t]he first seeks to

determine the actual historical intent" while "[t]he second starts with the conclusion that there was no actual historical intent." (Pet. at 10.) However, the court below viewed the reference to "historical intent" to be "a kind of shorthand," stating that "courts themselves commonly use the language of historic intent in situations that are really ones of hypothesized or reconstructed intent." (App. at 5a.) Under either formulation, Petitioners' argument does not differ materially. With respect to "historical intent," Petitioners' argument is that the parties' intent was limited to Commission-established ceiling prices; in the case of "reconstructed intent," Petitioners' argument is that if the parties had considered statutory ceiling prices, their intent would have been limited to Commission-established ceiling prices.

Petitioners' claim that they were denied due process is a broad-brush claim that is totally unsupported—they failed to identify even one piece of evidence that they were precluded from introducing. Thus, regardless of whether the issue is viewed from the perspective of "historical intent" or "reconstructed intent," the vast amount of evidence in the record remains the same. With respect to either perspective, the evidence supports the Commission's orders, not Petitioners' claim that the intent was limited to Commission-established ceiling prices. The individuals who negotiated, drafted, executed and administered the contracts at issue testified to an intent that was not limited to the Commission alone as the source of ceiling prices. As summarized by the court below, "the evidence 'overwhelmingly' showed that Northern and the producers intended the area rate clauses 'to trigger payment of all generally-applicable ceiling

prices established by federal authority.' " (App. at 14a), citing the ALJ's Initial Decision. *See Northern Natural Gas Company*, 43 FERC ¶ 63,015 at 65,149, 65,169 (1988). The testimony as to the parties' intent focused on the "generally-applicable ceiling price" without any limitation as to the source of the "federal authority." Further, the overwhelming evidence as to contract language, course of dealing, course of performance and trade usage supports the Commission's orders whether the perspective is "historical intent" or "reconstructed intent."

2. Contrary to Petitioners' assertion of conflict with other courts of appeals, the decision of the court below affirming the Commission is consistent with that of other courts which have considered the issue of the intent under an area rate clause. As noted above, the court below affirmed Commission orders finding that authorization to pay Natural Gas Policy Act (NGPA) ceiling prices was supported by the testimony of an intent " 'to trigger payment of all generally-applicable ceiling prices established by federal authority.' " (App. at 14a.) This is entirely consistent with the Fifth Circuit's view that authorization to pay NGPA ceiling prices is shown by evidence of an intent to "permit escalation to the highest ceiling price permitted by governmental authority." *Pennzoil Co.* v. *F.E.R.C.*, 645 F.2d 360, 369 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982). It also is consistent with another case before the D.C. Circuit, in which the court stated that NGPA prices would be authorized on a showing that the intent was to " 'allow the contract price to float to the highest relevant ceiling set by regulatory authorities . . . .' " *Associated Gas*

Distributors v. *F.E.R.C.*, 810 F.2d 226, 229 (D.C. Cir. 1987).

3. Petitioners' argument is limited to one narrow area—the parties' testimony of their mutual intent—and does not even address the other overwhelming evidence in the record. As recognized by the court below, the Commission affirmed an administrative law judge's decision that considered all relevant factors—"the contract language, the parties' testimony of mutual intent, their course of dealing, their course of performance, and trade usage." (App. at 14a.). Significantly, the court below noted that "[i]n affirming the ALJ, the Commission rested primarily on the evidence as to course of performance, which of course is probative *whether one thinks of the problem in terms of historical or reconstructed intent.*" (App. at 17a; emphasis added.) The court below, the Commission and the ALJ properly reviewed the extensive evidence in the record. Reexamination of the evidentiary and credibility findings made below is not a matter warranting review by this Court.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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January 17, 1992

No. 91-798

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

BRIEF FOR RESPONDENT CONOCO INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that substantial evidence was presented at an administrative evidentiary hearing in support of the conclusion that natural gas pipeline and producers intended the area rate clauses in their contracts to trigger the payment of Natural Gas Policy Act ceiling prices.

2. Whether substantial evidence was presented at an evidentiary hearing against Petitioners' contentions, given the fact that at such hearing they did not present the testimony of any witnesses, and their opponents presented the testimony of 70 witnesses.

PARTIES TO THE PROCEEDING

The parties to this proceeding are listed in the petition at pages ii and iii. Appendix A, *infra,* contains a list of the parent company and subsidiaries (except wholly owned subsidiaries) of respondent Conoco Inc. pursuant to Rule 29.1 of this Court.

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FEDERAL ENERGY REGULATORY COMMISSION,
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On Pettion for Writ of Certiorari To The United States Court of Appeals For the District of Columbia Circuit

BRIEF FOR RESPONDENT CONOCO INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

This brief in opposition is submitted by Conoco, Inc., one of the oil and gas producer Respondents in the proceedings below before the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is officially Reported at 934 F.2d 346. The opinion of the Court of Appeals on Rehearing is reported at 941 F.2d 1233.

The opinions of the Federal Energy Regulatory Commission are Reported at 48 F.E.R.C. ¶ 61,177 and 50 F.E.R.C. ¶ 61,177 . Each of these decisions are contained in the Appendix to the petition. The initial decision of the presiding Administrative Law Judge issued May 11, 1988, appears at 43 F.E.R.C. ¶ 63,015; and is reproduced in the Appendix to this brief.

COUNTERSTATEMENT OF THE CASE

A. Preliminary Statement

Both the Natural Gas Act ("NGA") and the Natural Gas Policy Act of 1978 ("NGPA") contain identical language to the effect that "[t]he finding of the Commission as to the facts, if supported by substantial evidence, *shall be conclusive*." 15 U.S.C. § 717a(b) [NGA § 19(b)], *id.* § 3416(a)(4)] The decisions of both the Commission and the court of Appeals below represent an unexceptional application of the substantial evidence rule.

The Petition for a Writ of Certiorari (the "Petition") almost entirely omits any description of the testimony and documentary evidence which is contained in the administrative record and extensive hearings transcript of about 5,400 pages. Most importantly, Petitioners fail to apprise the Court that at the evidentiary hearing held before an administrative law judge they offered no witness testimony—not a single witness.

No witness testimony was offered or presented by Petitioner at such evidentiary hearing despite the fact their opponents presented the testimony of some 70 witnesses. Petitioners' opponents being Northern Natural Gas Company and numerous natural gas producers which

were parties to the 1200 natural gas supply contracts being contested by petitioners.

Petitioners have pointed to nothing in the record to show that either the Commission or the Court of Appeals under such circumstances erred in determining, that the evidence presented "overwhelmingly" supported their opponents' case. 934 F.2d. at 350; 48 F.E.R.C. at 61,651-52.

B. Statement of Facts

In FERC Order No. 23-B, the Commission established a rebuttable presumption that "area rate clauses" in producer/pipeline contracts authorizing the payment of the maximum ceiling prices prescribed by the NGPA where the contracting parties asserts that this is their mutual intent. FERC Statutes and Regulations, Regulation Preambles 1977-1981 ¶ 30,065 and on Rehearing, *id.* at ¶ 30,073 (1979). In FERC Order No. 23-B, the Commission provided, however, that third parties (such as the petitioner utility commissions) could seek to rebut this presumption by filing protests. Both the Fifth Circuit and D. C. Circuit have affirmed the FERC Order No. 23-B presumption and related administrative procedure. See, *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied* 454 U.S. 1142 (1982); *Associated Gas Distribs. v. FERC*, 810 F.2d 226 (D.C. Cir. 1986).

Commission Proceedings Commenced

Over eleven years ago, Petitioners commenced proceedings before the Commission under FERC Order No. 23-B, in an effort to challenge the contracting parties interpretation of certain area rule clauses in approximately 1200 natural gas contracts entered into prior to the enactment of the NGPA in 1978. Following pre-

liminary hearings on the question of whether a sufficient showing was made to justify further evidentiary hearings, a Commission administrative law judge concluded that Petitioners had failed to meet their evidentiary burden needed to overcome the regulatory presumption. He, therefore, dismissed Petitioners' protests. 28 F.E.R.C. ¶ 63,028 (1984). The Commission reversed this ruling of the Administrative Law Judge, and remanded the Petitioners' case for a full evidentiary hearing to determine the contracting parties' intent. 33 F.E.R.C. ¶ 61,-355 at 61,455 (1985), *reh'g denied*, 34 F.E.R.C. ¶ 61,-261 (1986).

Administrative Law Judge

The Administrative Law Judge held extensive evidentiary hearings between November 12, 1986, and February 10, 1987, during which Petitioners' cross-examined 14 Northern witnesses and 56 producer witnesses, producing some 5,400 pages of transcript.[1] At that hearing Petitioner's "did not submit direct evidence or present testimony of any witness to support their claims." 43 F.E.R.C. ¶ 63,015 at 65,147; Appendix *infra* at 5a. Based on the record of these evidentiary hearings, the Administrative Law Judge issued a decision in which he found that Northern and its producers had "overwhelmingly" established that the area rate clauses contained in the contracts at issue were intended to trigger the payment and collection of NGPA ceiling prices. *Id.* at 65,149, 65,169; Appendix *infra* at 70a.

---

1. These, together with the Commission, are Respondent parties in this proceeding before the Court.

The Commission's Decision

Petitioners appealed the decision of the presiding Administrative Law Judge in favor of Northern and the Respondent producers to the full Commission. Upon its review the Commission affirmed the Administrative Law judge's reasoning and conclusions. . . ." 48 F.E.R.C. ¶ 61,177 at 61,653. In its decision the Commission further noted its affirmance of the Administrative Law Judge's decision was "mandated" by the Fifth Circuit's decision in *Hunt Oil Co. v. FERC*[2] *id.* at 61,651.

Court of Appeals Decision

Petitioner's sought review of the Commission's decision by the Court of Appeals. The Court of Appeals, upon completing its review rendered a decision which determined without any hesitation, that there was "substantial evidence in support of the Commisssion's orders. . . ." 934 F.2d at 353. In affirming the Commisssion's decision, moreover, the Court of Appeals also noted that at the administrative evidentiary hearing Petitioners had "offered no witnesses", even though their opponents had presented the testimony of some 70 witnesses. 934 F.2d at 350.

Even this rebuke by the Court of Appeals, however, was not sufficient enough to defer Petitioners ongoing efforts to further bloat the record and delay the ultimate termination of these proceedings. Rehearing and rehearing en banc was sought by Petitioners solely on the theory that the Court of Appeals' opinion violates the principle of *SEC v. Chenery*, 332 U.S. 194, 196 (1947); namely that courts may judge the propriety of an administrative agency's actions "solely by the grounds in-

2. 853 F.2d 1226 (5th Cir. 1988).

voked by the agency." 941 F.2d at 1234. According to the Court of Appeals, however, Petitioner's arguments in seeking a rehearing amounted to little more than an attempt to have the Commission "to embark on a wild goose chase." *Ibid.* The Court of Appeals, consequently, denied Petitioners' applications for both rehearing and rehearing en banc. 941 F.2d 1233.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS A STRAIGHT FORWARD APPLICATION OF THE SUBSTANTIAL EVIDEUCE RULE, RAISING NO ISSUE WORTHY OF REVIEW BY THIS COURT.

Petitioners contend that both the Commission and Court of Appeals decisions "disregard the most basic principles of administrative law. . . ." Pet. at 7. They argue in this respect that the effect of these decisions is to deprive Petitioners "of basic due process rights to present evidence and argument addressing the standards by which their case would be judged." *Id.* at 8.

The determinations made below by the Commission and Court of Appeals—as well as by the presiding Administrative Law Judge—are unquestionably correct. The contention by Petitioners that they somehow have been deprived of their due process rights to present evidence is completely unfounded. To the contrary, the record herein clearly establishes that Petitioners in the administrative proceedings below were afforded extensive and full discovery from both participants and non-participants. This is illustrated by the fact that during the more than 7 years Petitioners had to prepare their case

prior to the administrative evidentiary hearing, Petitioners completed some 16 depositions. These depositions were completed by Petitioners prior to the administrative evidentiary hearing in several diverse cities; including Omaha, Nebraska; Houston, Texas; Washington, D.C.; and Denver, Colorado.

At the administrative evidentiary hearing, nevertheless, Petitioners did not even attempt to present an affirmative direct case. 43 F.E.R.C. at 63,147; Appendix *infra* at p. 5a. That is to say, Petitioners at the evidentiary hearing "did not submit direct evidence or present testimony of any witness to support their claims." *Ibid.* Instead, Petitioners sought to conduct their case solely through the cross-examination of the witnesses who testified for their opponents' case. Petitioners' lengthy cross-examination of their opponents' witnesses lasted for some 34 days.[3] Such lengthy cross-examination, however was ultimately found by the Administrative Law Judge to be totally ineffective to impeach the testimony as given by their opponents' witnesses. *Id.* at 65,153; Appendix *infra* at 22a. As a consequence, the Administrative Law Judge understandably found that the testimony given by the witnesses for the producer respondents "not only preponderated, but did so conclusively." *Id.* at 65,154, Appendix *infra* at 26a.

Applicable precedent establishes that under the circumstances the factual findings as made by the Administrative Law Judge are to be given special weight, and are not to be easily ignored by the Commission.

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3. Protestors entire reliance upon cross-examination in lieu of an affirmative case, merely validates the observation of Professor Wigmore: "No Case! Abuse the oppoent's witness." J. Wigmore, Evidence § 8c, 640 (Chadborne Rev. 1976 & 1981).

Hunt Oil Co. v. FERC, supra at 1235 and cases cited therein.

Furthermore, the preponderance in the number of witnessess in favor of Respondents, is not a circumstance which should be overlooked by the trier of fact. *Rodi v. Dean,* 138 F.2d 309, 310 (7th Cir. 1943)

In addition, this Court has long recognized that with respect to findings of fact as made by an administrative agency, they are deemed "final" if supported by substantial evidence. See, e.g., *Cincinnati N.O. & T.P. Ry. v. ICC,* 162 U.S. 184, 194 (1896); *Consolo v. Federal Maritime Commission,* 383 U.S. 607, 619-620 (1966); *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consolo v. Federal Maritime Commission, supra.*

In short, the circumstances presented herein to the Court amount to nothing more than the Court of Appeals having applied the substantial evidence rule against testimony to support of their contentions regarding contract interpretation.

II.

THE COURT OF APPEALS DECISION DOES NOT SET ASIDE OR MODIFY THE PRIOR PRECEDENTS OF THE FEDERAL COURTS OF APPEALS REGARDING FERC ORDER NO. 23.

Petitioners contend at some length (Pet. 8-13) that the decision below conflicts with earlier rulings regarding the FERC Order No. 23 of both the Fifth Circuit and District of Columbia Circuit regarding the FERC

Order No. 23. They fail, however, to point to any specific evidence whereby the trier of fact below erred in determining that the particular area rate clauses in question were intended by the contracting parties to trigger the payment of highest applicable ceiling prices as established by Federal regulations, including those prescribed by the NGPA. In an attempt to create a conflict with prior FERC Order No. 23 appellate decisions, Petitioners depend primarily upon the Court of Appeals' discussion of the contracting parties intent relative to the scope Petitioners where they did not find any witness to present of the area rate clauses at issue. Contrary to Petitioners assertions of a conflict, the Court of Appeals actually followed the controlling precedents of both the Fifth Circuit and D.C. Circuit. See, *Pennzoil v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982); and *Associated Gas Distribes v. FERC*, 810 F.2d 266 (D.C. Cir. 1987). Indeed, in both these Appellate decisions as cited by Petitioners, it is recognized that the central question to be decided at the administrative evidentiary hearing was whether the contracting parties mutually intended in the area rate clauses at issue to authorize the collection of the NGPA ceiling prices. Petitioners ignore the actual holdings of these cases, as well as the Fifth Circuit's decision in *Pennzoil v. FERC*, 789 F.2d 1128. (5th Cir. 1986), and *Hunt Oil Co. v. FERC*, 853 F.2d 1226 (5th Cir. 1988). All these precedents clearly establish that the factual determination as the contracting parties' intent regarding area rate clauses must be based upon a weighing of " 'all evidence' - contract language, oral, and written extrinsic evidence and evidence of course of performance." *Hunt Oil Co., supra* at 1237, and cases cited therein. Petitioners arguments

simply cannot be squared with the holdings in the prior decisions concerning FERC Order No. 23.

CONCLUSION

For the reasons set forth above, the Petition for a Writ Certiorari should be denied.

Dated: January 17, 1992

Respectfully submitted,

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APPENDIX A

Pursuant to Rule 29.1, the following is a list of parent and subsidiary companies (except wholly owned subsidiaries).

CONOCO INC.
E. I. Du Pont De Nemours, Inc. (parent)
Big Sky of Montana Realty, Inc.
Cit-Con Oil Corporation
Conch International Methane Ltd.
Conoco Amazons Limited
Conoco Arabia Limited
Conoco Buton Ltd.
Conoco Cabinda (Angola) Ltd.
Conoco Cegonha (Angola) Ltd.
Conoco Dabaa Ltd.
Conoco El Hamma (Tunisia) Ltd.
Conoco Faghur Ltd.
Conoco Iraq Ltd.
Conoco Kayes (Congo) Ltd.
Conoco Kouilou (Congo) Ltd.
Conoco N-dombo (Gabon) Ltd.
Conoco North Ras Qattara Ltd.
Conoco North Sitra Ltd.
Conoco Onango (Gabon) Ltd.
Conoco Peru
Conoco South Umbarka Ltd.
Conoco Spain Ltd.
Conoco Warim Ltd.
Conoco West Ras Qattara Ltd.
Conoco Yemem (Aden) Ltd.
Conoco Yemen (Sanaa) Ltd.
Dubai Exploration Onshore Company
Felix Oil Company
Jupiter Chemicals, Inc.
Kettleman North Dome Association
Oberrheinische Mineraloelwerke
Petrocokes, Ltd.
Petroleum Terminals, Inc.

The Seagram Company Ltd., through its wholly owned subsidiary companies owns approximately 24.5 percent of the common stock of Conoco's parent, E. I. Du Pont De Nemours, Inc., and Company
The Standard Shale Products Company
Tidelands Royalty Trust

APPENDIX B

NORTHERN NATURAL GAS COMPANY,
Division of Eron Corporation,
Docket No. GP80-43-009 (Phase I) Remand
INITIAL DECISION

(Issued May 11, 1988)

Stephen L. Grossman,
Presiding Administrative Law Judge.

* * *

I. *Background*

This is a third-party protest proceeding conducted pursuant to the Order No. 23 series rulemakings. The protest involves the proper interpretation of area rate clauses (ARCs) in more than 1200 natural gas purchase contracts executed prior to passage of the Natural Gas Policy Act of 1978 (NGPA) between Northern Natural Gas Company. Division of Enron Corp. (Northern or the Company) and various producers (Producers) (collectively Parties). This case was initated in November 1979 when the Minnesota and South Dakota Public Utitity Commissions (PUCs) and the Federal Energy Regulatory Commission (Staff) (collectively Protestors) objected to the Parties' claim that ARCs authorized Northern to pay ceiling prices established by the NGPA

for certain categories of gas subject to the Commission's jurisdiction. In 1986. Peoples Natural Gas Company (Peoples) also joined as a protester in this proceeding Both Peoples and Northern were previously subsidiary companies of InterNorth, Inc., prior to its incorporation into Enron. Peoples, now a Northern customer, is an intrastate local distribution company (LDC) owned by UtiliCorp United, Inc.

The precise issue set for review is whether the Parties *intended* ARCs to trigger payment of NGPA ceiling prices when the contracts at issue were entered into. *Northern Natural Gas Company*, 33 FERC ¶ 61,355, at p. 61,706 (1985). The Parties agree that they had such an intent. Protesters, however, argue numerous theories in opposition

Under Order No. 23 third-party protest procedures, where the contracting parties agree that an ARC was intended to authorize collection of ceiling prices under the NGPA, there is a presumption in favor of their interpretation. Third-parties have the burden to produce reliable and probative extrinsic evidence which specifically contradicts the parties' intent in order to rebut and thereby "burst the bubble" of this presumption. *Associated Gas Distributors v. FERC*, 810 F.2d 226, 228 (D.C. Cir. 1987). Once the presumption disappears, the contracting parties have the burden to prove their mutual intent by a preponderance of the evidence. *Pennzoil Co. v. FERC*, 645 F.2d 360 (5th Cir. 1981), *cert. denied*, 454 U.S. 1142 (1982) (*Pennzoil I*). The parties may still, however, introduce evidence of their mutual assertion of intent and contract language in order to establish the proper ARC meaning. *See United Gas Pipe Line Co.* 40 FERC ¶ 61,062, at p. 61,174 (1987).

Initally, Protestors supported their position by arguing that the ARC language refuted the Parties' claimed intent. On March 12, 1981, however, Staff supplemented its protest with the introduction of a pleading filed by People, then a division of InterNorth, in a declaratory judgment action in Federal District Court involving an intrastate contract with McCoy Petroleum Company (McCoy). In its pleading Peoples denied that its ARCs triggered payement if NGPA prices except to the extent that such prices were cost-based. 33 FERC ¶ 61,355, at p. 61,705. Since both Northern and Peoples had the same parent company, Staff asserted that Peoples' pleading constituted reliable and probative evidence that Northern did not intend to pay NGPA ceiling prices pursuant to ARCs.

On August 31, 1983, a hearing was set to establish whether Peoples' views reflected those of Northern. 24 FERC ¶ 63,085 (1982). On August 10, 1984, an Initial Decision was issued dismessing the case because it was found that the Peoples evidence was not reliable and probative evidence of Northern's intent, for Order No. 23 purposes. 28 FERC ¶ 63,028, at p. 65,093. On December 12, 1985, however, the Commission reversed this finding and remanded the proceeding for a hearing to determine the Parties' intent. 33 FERC ¶ 61,355.

Prehearing conferences were held following the Commission's order, to establish procedures and define which contracts were at issue. See 34 FERC ¶ 63,117. Despite having had prior extensive discovery during this proceeding. Urotestors were granted further opportunities to gather information from all Producers and Northern Protestors conducted depositions of fifteen Northern witnesses

and deposed the Producers' except witnesses Mr. Jack Earnest. Additionally, Protestors submitted data requests on the Parties and received voluminuous documents as a result. After having seven years to prepare its case, and two opportunities to examine all of Northern's files, Protestors nevertheless did not submit direct evidence or present testimony of any witness to support their claims.

On November 12, 1986, the hearing commenced. Protestors were limited to cross-examination of the Parties' witnesses for impeachment purposes, since they failed to present an affirmative case. (Tr. 562, 3058, 3148-49) Wide latitude of questioning was permitted, however, during cross-examination. (*See e.g.*, Tr. 803, 826, 5056.) Protestors cross-examined fourteen Northern Witnesses and fifty-six Producer witnesses. After observing and listening to the witnesses at hearing, and upon reviewing the proffered but not introduced testimony of the remaining Producer witnesses, the Presiding Judge determined no new information would be elicited from the fifty-eight Producer witnesses who had yet to testify. The record was closed on February 10, 1987, because the only testimony yet to be presented would have been cumulative. (Tr. 5862-5863, 5958) The previously submitted testimony of the non-testifying parties were disregarded, but those producers were permitted to submit briefs on the basis of the record testimony. (Tr. 5814-5816)

Subsequent to the record closing, Protestors were allowed a final opportunity to gether evidence through post-record closing discovery for a forty-five day period beginning February 10, 1987. (Tr. 5949) Still, not ,process of law and to raise her innocent spouse defense was found.

Initial Briefs were filed on August 3, 1987. Reply Briefs were filed on October 20, 1987. Rebuttal Briefs were submitted December 18, 1987.

II. *Legal Standards*

As discussed *supra*, we are now at the stage of this proceeding where the burden of proof is on the contracting parties to prove, by a preponderance of the evidence, that their mutual intent at the time of contract execution was that the ARCs in issue would allow for payment of NGPA ceiling prices. To satisfy the preponderance of the evidence standard, the evidence must be of a greater weight and more convincing than that which is put forth by the opposition. *Smith v. United States*, 557 F.Supp. 42, 51 (W.D. Ark. 1982), *aff'd*, 726 F.2d 428 (8th Cir. 1984).

In conducting this inquiry, State contract law principles are to be applied. *Pennzoil I*, 645 F.2d at 387. Since the sale of natural gas is considered as a sale of goods under the Uniform Commercial Code (UCC), general UCC rules will be used in this case. *See Id. Pennzoil Co. v. FERC*, 789 F.2 1128 at 1142 (5th Cir. 1986) (Pennzoil II). (Louisiana is the only state relevant here which has not adopted the UCC, but its contract law is consistent with general UCC principles applied here.) Accordingly, relevant factors to consider are the contract language, course of performance, course of dealing, usage of trade, and the commercial and regulatory context in which the contracts were negotiated. Also, as explained previously, all other extrinsic evidence, such as the contracting parties' assertions of intent, must be reviewed. *Pennzoil II*, 789 F.2d at 1140-45.

Because Staff and PUCs have not presented a direct case, the Parties' evidence will preponderate if it is found that the proven evidence is credible. The trier of fact determines credibility by evaluating the witnesses' perception, memory and narration. Charles T. McCormick, *McCormick on Evidence*, Ch. 5, p. 72, n.1 (3rd Ed. 1984). Despite Protestors' arguments to the contrary, evidence elicited on cross-examination is not substantive evidence and cannot be used by a party to present its case-in-chief. *Refrigeradora Del Noroeste, SA v. Appelbaum*, 138 F. Supp. 354, 360 (N.D. Ill. E.D. 1956), *modified on other grounds*, 248 F.2d 858 (7th Cir. 1957), *cert. denied*, 356 U.S. 901 (1958). If Protestors desired to establish their case by testimony of particular witnesses, it should have called those witnesses in support of their affirmative case. *See United States v. Buchanan*, 500 F.2d 398, 399 (5th Cir. 1974) (per curiam).

Protestors try to inject into the proceeding certain legal theories which are unfounded and lack precedential authority. First, they allege that in order for a particular producer to prevail in this case it must appear individually and present evidence of its intent. (PUCs Br. at 67; Staff Br. at 16) This proposed rule of law is entirely without support. As the Fifth Circuit explained in *Pennzoil I*, 645 F.2d at 392, it is sufficient to prove the parties' intent by the contract language, commercial context and other probative extrinsic evidence, "without the testimony of those who negotiated the contract." Furthermore, in *Pennzoil II*, the Fifth Circuit approved the Administrative Law Judge's method below of conducting the Order No. 23 proceeding which included making findings for groups of producers based on the totality of the testimony of a representative sample. *See*

Pennzoil II, 789 F.2d at 1145 n.44. Therefore, testimony which is representative of all producers will sufficiently satisfy the required evidence needed for them to meet their burden of proof. Moreover, Northern as a party to each contract, can and did testify as to the mutual understandings underlying every negotiation.

PUCs also contend that each Producer must testify since each possesses certain "unique evidence", or else an adverse inference must be drawn against that producer. (PUCs Br. 82-83). In this case, however, there was no showing that any producers possess unique information which was unavailable to Protestors. Protestors had over seven years to develop their case. The time for asserting that they were deprived of such materials has long since passed. Northern and Producers have the right to formulate their own case presentation and introduce evidence from those witnesses who they feel will most effectively support their contentions. Additionally, PUCs' allegations that Northern actively withheld evidence of relevant facts, and that Northern presented unknowledgeable witnesses when potentially knowledgeable ones were available, are meritless and highly inappropriate. (PUCs Br. at 68)

Second, Protestors argue that evidence must be presented on a contract-by-contract basis, and therefore, any producer not introducing evidence which pertains to a particular contract cannot prevail in regard to that contract. (Staff Br. at 38; PUCs Br. at 46-69) This claim is premised on the Court's declaration in *Pennzoil I*, 645 F.2d at 386-387, that state law, instead of federal common law, should apply in Order No. 23 proceedings on a case-by-case basis to all jurisdictional natural gas purchase contracts. There was absolutely no mention

by the Court, however, of a need for a contract-by-contract adjudication in third-party protest proceedings. Case-by-case, in the context employed by the Court, simply means pipeline-by-pipeline adjudication. That is precisely what is done here. In fact, as explained *supra*, the applicable state law requires considering extrinsic evidence of course of performance, course of dealing and usage of trade to interpret the parties' intent. The very essence of considering such evidence is to determine whether there was a general understanding between the Parties, or in the industry as a whole, as to the meaning of such clauses. For example, the evidence could establish that based on the Parties' general understanding, a particular meaning attached to ARCs regardless of words used or specific circumstances related to each contract. There is no need to introduce contract-by-contract evidence to support such a finding.

Finally, Staff's reliance on Opinion No. 77 to ascertain the Parties' intent is misplaced. (Staff Br. at 38-41) In Opinion No. 77, *Independent Oil and Gas Association of West Virginia*, 10 FERC ¶ 61,214, at p. 61,398 (1980), the Commission explained that ARCs will generally not authorize collection of NGPA rates if the contract clause "contains the following disqualifying terms:"

> (1) It refers to rates established or prescribed by an administrative body;
>
> (2) It couples the reference to administrative action with reference to the Natural Gas Act or the "just and reasonable" standard of that Act, and
>
> (3) It contains no additional language which has the effect of uncoupling the link between agency action and the statutory standard of the Natural Gas Act. *Id.*

On brief, Staff argues that since these three prongs were satisfied, "[o]nly if Northern and producers can provide satisfactory extrinsic evidence of contemporaneous communications of intent can they prevail." (Staff Br. at 41) Staff, however, cites no support for such a standard and no precedent has been suggested. As the court stated in Opinion No. 77, these three factors are only considered "[i]n those cases where there is no reliable and probative evidence of intent or where such evidence is inconclusive". 10 FERC ¶ 61,214, at p. 61,398. As discussed *infra*, in this case there is reliable and probative evidence of the Parties' mutual intent, and it is not only conclusive, but overwhelmingly so. Therefore, the Opinion No. 77 formula is not applicable here. Additionally, Opinion No. 77 was, by its terms, applicable to second-party protests (i.e. disputes between the pipeline and the producer), not third-party proceedings such as that here considered.

III. *Contract Language*

The first step in determining the meaning of ARCs is to evaluate the contract language. *Pennzoil II*, 789 F.2d at 1140. "The words of the contract establish a universe of reasonable interpretations; evidence of the parties' intent guides the [court] in choosing among these possible interpretations." *Id.* at 1141.

When evaluating the words used in ARCs, the commercial and regulatory context and all extrinsic evidence of intent must be considered. The Commission has expressly rejected the "plain meaning rule," which requires that unambiguous contracts be interpreted by looking only at contract words. *See Pennzoil I*, 645 F.2d at 369.

On brief, Staff categorizes the ARCs at issue into five general types and lists sub-types within each category. (Staff Br. at Appendix A). They contend that all ARCs either do not specifically permit collection of higher prices under the NGPA or if they do, the ARCs were not in effect for the periods at issue in this case. In the text of its brief, Staff claims that ARC language unambiguously allows only for administratively-set rates. (Staff Br. at 30, 41)

PUCs contend that particular types of ARCs at issue plainly preclude collection and payment of NGPA prices. (PUCs Br. at 247-254) They argue that clauses not referring to congressionally-set rates, but which recognize that other bodies could take actions triggering application of ARCs, do not allow payment of NGPA prices. PUCs also state that certain types of clauses have already been found by the Commission to be incompatible with the Parties' stated intent. PUCs, however, have introduced no testimony or documentary evidence to support their claims. The rely entirely on unsupported innuendo and speculation. There is nothing within the four corners of Northern's contracts to substantiate the PUCs' arguments.

The Parties allege that all ARCs allow for and require payment and collection of NGPA ceiling prices. Northern's witness, Mr. McCarthy, stated that the words used were intended to require Northern to pay and the Producers to collect the highest prices (regulated) allowed by law. (NNG-1 at 8) Mr. Earnest, the Producers' expert witness, stated that there was a general industry understanding that ARC language accurately expressed the Producers' intent to collect the regulated ceiling price. (IP-R-1 at 10-11)

As the Fifth Circuit stated in *Pennzoil I*, 645 F.2d at 388.

> [a]mbiguity easily arises when the contract is applied to the subject matter in changed circumstances. Area rate clauses are certainly ambiguous as applied to the collection of currently available ceiling rates for natural gas. A contract should be interpreted in light of the changed circumstances to accomplish what the parties intended.

Although Protestors concentrate on the words used in ARCs to derive the meaning of the clause, as is discussed infra, the facts in this case show that the particular words were generally irrelevant to the Parties' intent. None of the clauses at issue restrict ARC meaning such that they can only allow for payment of administratively-set, cost-based rates. The Parties changed ARC wording over the years to keep pace with Commission regulations, but at all times the clause was intended to have an expansive intent obligating Northern to pay the generally-applpicable ceiling rate. In order to determine proper ARC meaning, an analysis of the changed circumstances relating to ARCs is necessary.

As between the contracting parties in this case, ARC language is unambiguous. At all times they have agreed that NGPA ceiling prices are triggered by ARCs. As to third parties, however, the words used are ambiguous. This ambiguity is found because the ARCs do not expressly prohibit collection of NGPA rates, and not because the language is insufficient to allow for collection of NGPA ceiling prices. Consequently, consistent with the findings in *Pennzoil I*, an evaluation of the extrinsic evidence must be undertaken to determine whether the Parties' mutual intent at the time of contract execution was to allow for collection of NGPA ceiling prices.

IV. *The Parties' Testimony of Mutual Intent*

A. Testimony of Northern's Intent

Northern sponsored the testimony of fifteen witnesses to support its position that ARCs triggered payment of NGPA ceiling prices. Fourteen of these witnesses were cross-examined by Protestors during the hearing (the other witness, Mr. T. N. Wright, died subsequent to the filing of his testimony in the pre-remand phase of this case). These witnesses were directly involved in the drafting, negotiation, execution and administration of the ARCs at issue. Their testimony covers the entire time from Northern's first use of ARCs through the period when the Company began payments of NGPA ceiling rates. The testimony overwhelmingly shows that Northern's intent, at the time it entered into contracts with ARCs, was to pay any regulated ceiling price pursuant to these clauses. By the term "ceiling price", it is abundantly clear that the Parties contemplated such prices authorized by the appropriate government body and applicable generally and uniformly throughout the affected industry in essentially an automatic, self-operating manner.

Northern's first witness to testify at hearing was Mr. Patrick J. McCarthy, an attorney with the Company from 1955-1986. Mr. McCarthy and his staff were responsible for handling legal matters related to gas supply for Northern, its parent company and various operating divisions and subsidiaries. (NNG-R-1 at 3-5) This included drafting and negotiating contracts with ARCs, as well as advising personnel during the contract negotiation process. (NNG-R-1 at 7-8) Mr. McCarthy was familiar, therefore with ARC language and Northern's intent. (*Id.* at 14)

Mr. McCarthy consistently testified that Northern intended ARCs to trigger payment of NGPA ceiling prices.

(*Id.* at 8-9) This is consistent with statements he made in a memorandum prepared for Northern's management on November 6, 1978, immediately subsequent to Congressional enactment of the NGPA. (NNG-R-2) Also, this same intent was expressed in a letter responding to a producer inquiry in 1979. (NNG-R-3)

Mr. Frank D. Stockman, Vice President of Northern's Supply Division from 1965-1977, also testified on behalf of the Company. As Vice President, he was responsible for all phases of Northern's domestic gas supplies. (NNG-R-13 at 2) Mr. Stockman was involved in executing all of the Company's gas purchase contracts during the time when ARCs were first incorporated in Northern's contracts. He was also employed by the Company from 1956-1965 and 1977-1982 in other capacities. (*Id.* at 1-2)

Mr. Stockman stated that ARCs represented Northern's intent to pay the highest prices allowed by law or regulation. (*Id.* at 3-4) He also testified that the Company's intent was the same, regardless of the particular ARC wording employed, for all contracts he executed while serving as Vice President of Supply. (Tr. 2624) At hearing, Mr. Stockman displayed outstanding knowledge of Northern's use of ARCs and all related issues. He was a very credible witness for the Company.

Mr. Daniel Dienstbier succeeded Mr. Stockman as Vice President of Northern's Supply Division in 1977, and continued in that capacity through 1980. In addition, he has held positions for Northern's parent company and its subsidiaries. (NNG-R-14 at 1, 2) Mr. Dienstbier also testified that it was the intent and meaning of ARCs to entitle Producers to collect the maximum prices allowed by law. His statements were based on his prior personal

investigation in 1978, communications with the Supply Division staff in 1978, and on his involvement with natural gas purchase contracts while serving as Vice President of Northern's Supply Division. (*Id.* at 3)

Mr. Larry N. Reed, an employee of Northern from 1964-1980, also testified in support of the Company's position. From 1977 through 1979, Mr. Reed was General Manager of all Northern gas acquisitions in the lower 48 states and the Gulf Coast. In this capacity he reported directly to Mr. Dienstbier. (NNG-R-7 at 3) His primary responsibilities involved supervising all of Northern's gas buyers to make sure that they were informed of the Company's objectives, policies and negotiating strategies concerning gas purchase contracts. (*Id.* at 4) Many of these contracts contained ARCs. Mr. Reed, consequently, was very familiar with Northern's use of ARCs and the intended meaning of such clauses, especially immediately prior to and subsequent to passage of the NGPA. He testified that the Company's intent was for ARCs to provide for the payment of ceiling prices set by the federal government for the interstate market, regardless of whether Congress or a government agency set the price. (*Id.* at 6-8)

Northern also filed the testimony of Mr. Marvin Wilson. Mr. Wilson was employed by the Company from 1956-1984. Throughout this time he was directly involved in the acquisition of natural gas supplies. Initially, Mr. Wilson was an Assistant to the Gas Purchase Manager and later he became Director and Manager of Gas Purchases. From 1969-June 1984 he held a variety of management positions related to gas acquisitions. (NNG-R-8 at 2) During his entire tenure with Northern, Mr. Wilson was

personally involved in many major natural gas purchase contracts. (*Id.* at 4) Mr. Wilson testified that ARCs were included in contracts so that Northern could provide Producers with the federal interstate ceiling price. (*Id.* at 5, 7) Also, he explained that the purpose and intent of ARCs remained the same despite changes in ARC language. Furthermore, he agreed that ARCs triggered payment of ceiling prices no matter which federal government entity set that price. (*Id.* at 10-11) Finally, Mr. Wilson believed that Mr. McCarthy's 1978 memorandum accurately concluded that payments of NGPA prices were triggered by ARCs. (*Id.* at 13)

Mr. C. James Bulla was an employee of Northern from 1952-1981. Beginning in 1956, he became directly involved with the Company's natural gas purchase contracts. His duties with Northern included negotiating contracts as a gas buyer and later supervising other acquisitions personnel. (NNG-R-10 at 1, 2) The gas purchase agreements Mr. Bulla dealt with often contained ARCs. In his prepared direct testimony, Mr. Bulla stated that Northern's intent was to pay all ceiling prices and that Producers would automatically collect any changed ceiling prices irrespective of whether the Federal Power Commission (FPC), FERC or Congress established the new rates. (*Id.* at 4) In addition, Mr. Bulla received Mr. McCarthy's 1978 memorandum and agreed that it properly expressed the Company's intent.

Mr. William J. Poehling, who is presently an employee of Northern, also testified in this proceeding. Mr. Poehling commenced his employment with the Company in 1956 and worked directly with gas acquisitions from 1967 until April 1984. His job functions included negotiating natural gas contracts as well as supervising other Northern

buyers. (NNG-R-11 at 2, 3) Mr. Poehling testified that it was Northern's intent to pay interstate ceiling prices set by any federal authority, regardless of ARC language variations contained in Company contracts. (*Id.* at 6, 7) Mr. Poehling also explained that he and the buyers in his department agreed with Mr. McCarthy's conclusions in the 1978 memorandum.

Northern also filed the prepared direct testimony of Mr. Charles K. Dempster. Mr. Dempster worked in gas purchasing positions with Northern from 1975-February 1986. Among his duties was the negotiation of natural gas purchase contracts containing ARCs. His testimony corroborated the statements of the other Northern witnesses. He testified that it was the Company's intent to pay the maximum price allowed by law when it entered into contracts with ARCs. This included ceiling prices established by Congress instead of the FPC. (NNG-R-12 at 3) Mr. Dempster agreed with Mr. McCarthy's memorandum. (*Id.* at 5)

Mr. J. P. Guinane also offered testimony consistent with the other Northern witnesses. He has worked with Northern from 1954 to the present. From 1968-1979 Mr. Guinane was involved with purchasing activities for Northern and he is currently the Company's General Manager of Operations. From 1970-1977, when Mr. Guinane was Manager of Gas Acquisition, he was directly involved in negotiating natural gas purchase contracts containing ARCs, and also supervised Company buyers. (NNG-R-4 at 4-6) He testified that it was Northern's intent under ARCs to pay the interstate ceiling price allowed by law, including ceiling prices set by Congress. (*Id.* at 6-7) Additionally Mr. Guinane stated that all Company personnel who negotiated natural gas purchase

contracts were instructed to act in accordance with this intent. (*Id.* at 7)

Finally, Mr. Dennis F. Brune, an employee of Northern since October 1966, presented convincing testimony in support of the Company's asserted intent. He had held a variety of positions at Northern. From 1973-1978, as Supervisor of Regulatory and Pricing Control, Mr. Brune was responsible for determining the proper payments to be made to producers for natural gas charges. (NNG-R-22 at 2) From 1978-1982, Mr. Brune was Director of Contract Control. In this capacity he was responsible for deciding on contract payments, managing records of the gas purchase contracts, and developing and operating the natural gas contract data base. (*Id.*) Mr. Brune was a very credible witness who was familiar with Northern's intent and actions. His responsibilities, as well as contacts with Company personnel and producers, led him to state that "it was obvious that the intent of the area rate clause was to provide the highest price allowed by law." (*Id.* at 3) He further explained that the "highest price allowed by law" included prices set by any federal government entity. (*Id.*) Mr. Brune also expressed this intent in various correspondence. (See *Id.* at 4, NNG-R-23 (DFB-2); *Id.* at 6-7, NNG-R-24 (DFB-3); *Id.* at 19, NNG-R-33 (DFB-12))

Protestors unsuccessfully attempted to impeach Northern's witnesses. Generally, they attacked credibility by questioning witnesses on matters for which they were not presented and as to which no direct testimony was offered. For example, the PUCs brief on page 106 alleges that Mr. Stockman was declared incompetent during the hearing. (Tr. 2629) This is a gross distortion of the record. Counsel for the PUCs was examining Mr. Stockman on

the technical meaning of words used in ARCs, yet the witness was not responsible for drafting ARCs or deciding on what language should be used in the clauses. He was presented only to testify as to his belief of the Company's intent. Counsel for the PUCs seemingly would label witnesses incompetent when they cannot respond to questioning outside their universe of knowledge. This is an innovative but absurd argument. The Presiding Judge observed and assessed the credibility of all witnesses and finds all to have testified honestly, albeit some had less than complete knowledge of the area for which they were proffered. In those instances, however, those witnesses freely acknowledged their limitations.

The PUCs also attack Northern witnesses for not specifically *knowing* what Producers specifically intended when entering particular contracts with ARCs. (Staff Br. at 42, 45-46; PUCs Br. at 101) Northern witnesses generally *believed* that Producers intended to collect the highest prices allowed by law pursuant to ARCs. (*See* Tr. 936) They could not, however, absolutely know the intent.

Protesters further try to impeach Northern witnesses because they cannot recall details of negotiations, discussions and meetings. (Staff Br. at 43-46, PUCs Br. at 98, 99, 102 n. 173) PUCs question Mr. Guinane's credibility by stressing his inability to remember at which meetings ARC's meaning was discussed. (PUCs Br. at 99) Mr. Guinane testified that ARCs were discussed along with all other contract clauses during meetings. (Tr. 980) These conversations took place more than a decade ago when Mr. Guinane was involved with gas acquisitions for the Company. Although an inability to remember details will affect the weight given to witness testimony, it would be unusual for anybody to be capable of listing specifics from

discussions occurring after such a great period of time has lapsed. In this case, Northern witnesses consistently stated that the Company intended to pay ceiling prices pursuant to ARCs. Their inability in 1987 to recall particular conversations and statements made in the 1960s and 1970s does not negate the accuracy of their testimony.

Protestors try to impeach the statements of Mr. McCarthy by focusing on a small portion of his testimony and ignoring its clear meaning to the contrary. For instace, they claim that Mr. McCarthy's testimony is flawed because he agreed that it was *possible* that a member of Northern's management *could have* interpreted ARCs which only refer to the FPC as allowing only FPC price setting. (PUCs Br. at 110) (emphasis added) Mr. McCarthy's statement, however, was made in order to show how one *may* interpret an ARC by looking at the language itself. As was discussed previously, ARCs are to be evaluated by considering the language as well as all extrinsic evidence of intent. Northern's intent was known to Northern's personnel and to Producers, and clearly expressed in his 1978 memorandum which stated that the Company intended to pay ceiling prices pursuant to ARCs. This memo was circulated to 24 employees of Northern, who were natural gas buyers, attorneys, officers and contract administration personnel, and none of them indicated any disagreement with the memorandum's contents. (NNG-R-1 at 16)

PUCs also claim that certain witnesses lack credibility because their job responsibilities did not give them adequate knowledge to testify on Northern's intent. For example, they assail Northern's Vice President for Gas Supply, Mr. Stockman, because he did not read the

contracts he signed and never discussed the ARC intent with Producers. (PUCs Br. at 105, 106) Mr. Stockman, however, was very knowledgeable about Northern's intent because he was involved in shaping the Company's policy in regard to gas purchase contracts containing ARCs. The fact that he did not perform job tasks which the PUCs would have him carry out does not negate the strength of his testimony. The PUCs' assertions that Northern witnesses should have performed their jobs in a different manner has no bearing on the witnesses credibility. All Northern witnesses had adequate knowledge as a result of their positions at the Company to testify in regard to Northern's intent when using ARCs.

Protestors further attack Northern's witnesses by claiming that they have not consistently expressed a verbal formula of the Parties' intent. (PUCs Br. at 158) In essence, the PUCs claim that the Parties' position is ambiguous because witnesses used different words to describe ARC meaning. For example, some witnesses explained that ARCs provided for payment of the highest price allowed by *law*, and others used the words, highest price allowed by *federal regulation*. This is a preposterous argument. Both statements are sufficiently broad enough to allow triggering of NGPA ceiling prices, just as are other similarly worded phrases. Significantly, the Fifth Circuit found that an intent to pay NGPA ceiling prices was sufficiently described as one that would "permit escalation to the highest ceiling price permitted by governmental authority." *Pennzoil I* at 369. In addition, the D.C. Circuit found it sufficiently clear to describe an intent to pay NGPA ceiling prices as one that would "allow the contract price to float to the highest relevant

ceiling set by regulatory authorities. . ." *Associated Gas Distributors,* 810 F.2d at 229.

Finally,another impeachment tactic of Protestors was to ask questions about subject matter which was unrelated to the payment of NGPA ceiling prices, and then claim that since the witnesses' answers were not uniform, the witnesses were not believable. For example, the PUCs stress that witnesses gave differing answers regarding whether deregulated prices would be paid pursuant to ARCs. (PUCs Br. at 163-165) This line of questioning is meaningless since the issue here is whether NGPA ceiling prices were intended to be paid pursuant to ARCs. The fact that witnesses did not give a uniform answer about deregulated prices does not negate the overwhelming testimony by all witnesses that NGPA ceiling prices were intended to be paid under ARCs. What occurred, in fact, is that the witnesses stated ARCs are intended to define pricing under regulation, not deregulation. They attempted to answer Protestors' rather complex, hypothetical questions about situations not within the coverage of ARCs. Their answers are indicative of the confusion engendered by the questions themselves.

In sum, the testimony of Northern's witnesses clearly and conclusively supports Northern's claim that it intended ARCs to trigger payment of NGPA ceiling prices when the contracts at issue were entered, and that Northern believed Producers shared that intent. Protestors have failed in their attempt to impeach the witnesses' credibility through irrelevant and unfounded arguments.

B. Producers' Testimony of Intent

Fifty-six Producer witnesses testified and were cross-examined during the 21 days of hearings. Although other producers proffered direct evidence, their testimony was not considered since they were not presented and cross-examined. As noted above, this additional direct evidence would have been cumulative.

Producer witnesses consistently explained that interstate pipelines were to pay the maximum lawful ceiling price established by federal authority pursuant to ARCs. (SUN-R-1 at 2, PZL-R-1 at 3; ROD-R-1 at 2; OCC-R-1 at 7-8; LW-R-1 at 7-8; KOC-R-1 at 3; NGOC-R-1 at 5) Many producers, in fact, recalled holding specific conversations with Northern to that effect. (ARI-R-1 at 1; TEX-R-2 at 9; TEX-R-14 at 6-7, DSE-R-1 at 3-4; IOC-R-1 at 3-5; CNR-R-1 at 5-6; CON-R-1 at 6). For example Mr. L. E. Hickman of Texaco U.S.A., who negotiated several natural gas sales contracts for his company, testified that he remembered discussing with Northern that it was Texaco's intent to collect the highest regulated price in the interstate market. (TEX-R-2 at 8, 9; Tr. 3677) For many producers, it was company policy to insert ARCs into gas sales contracts so that they could collect the highest prices allowed by law. (AHC-R-1 at 3; *See also* ARC-R-1 at 5; TEX-R-1 at 5; TEX-R-15 at 4; FIN-R-1 at 2)

The Producers also repeatedly explained that it was their intent to collect ceiling prices irrespective of which authority, such as an administrative agency or Congress, set natural gas rates. (ROD-R-1 at 5, 6; SOC-R-1 at 8; SRC-R-5 at 4-5; TEX-R-1 at 9) Producers did not believe it was necessary to list each and every plausible

pricing mechanism, and it was not possible that all contingencies regarding rate regulation could have been anticipated. (APC-R-1 at 5) As Mr. Douglas Bendell of Okmar Oil Company testified, he and a Northern representative would sit down and write language that they thought would, under all circumstances, provide that gas bought pursuant to ARCs would never be priced lower than the highest price allowed by law. (Tr. 5174, 5175). The ARC was to be an all-encompassing clause which automatically allowed price escalations when the applicable gas price increased.

Over time, as Producers and Northern continuously inserted ARCs into contracts, the use became so common that the Parties saw no need to discuss the meaning of the clause or its particular wording upon executing each contract. (PPC-R-1 at 5; AHC-R-1 at 4). Although ARC wording evolved as the regulatory environment changed, the clause was always intended to permit payment of ceiling prices. As Mr. Walter Cox of the Phillips Petroleum Company and Phillips 66 Natural Gas Company stated it was believed that there was no "special magic involved in a specific set of words because the intent under all the clauses was the same." (PPC-R-1 at 7)

Protestors attempt to impeach Producers just as they attacked the testimony of Northern's witnesses. First, they contend that Producers lack credibility because they did not *know* what Northern officials intended when entering ARCs. (PUCs Br. at 117, 186). Producers did generally *believe* Northern shared their intent, and as was previously discussed, this is certainly sufficient credible testimony. As was also explained *supra*, this belief was accurate.

Second, Protestors stress that the Producers did not recall details from discussions which took place more than a decade ago. (*See* PUCs Br. at 116-131). Again, this is but one factor to evaluate when determining witness credibility. In this case, however, almost all Producer witnesses presented very credible testimony which consistently explained that they intended to collect NGPA ceiling prices pursuant to ARCs. Such overwhelming testimony outweighs the Protestors' weak contention.

Third, Protestors attack certain Producer witnesses for being unfamiliar with regulatory markets. (Staff Br. at 99-100; PUCs Br. at 125-131) These Producers, however, only offered testimony in regard to the factual question of intent under ARCs. As the Producers stated on rebuttal brief, "[t]hey did not appear for purposes of taking a quiz on esoteric regulations Br. at 46). Their knowledge on regulatory matters is irrelevant to their testimony of intent.

Fourth, Staff raises a series of other failed contentions on brief. It attacks some Producer witnesses for generally not participating in, or being knowledgeable about, the contract negotiations process, and for not being employed by the producer when contracts at issue were executed. (Staff Br. at 98-99) Staff's contentions, however, are unsubstantiated and unpersuasive. Certain Producer witnesses had job responsibilities which required them to negotiate contracts and others did not. This does not mean that they cannot be familiar with their Company's intent through their other job responsibilities. Also, although some Producer witnesses were not employed by their Company at the time when some contracts were executed, they were still familiar with ARC intent through subsequent experiences. There was certainly substantial

Producer testimony on ARC intent which greatly preponderated over Protestors' attempts at impeachment. The Producers consistently explained that NGPA prices were to be paid under ARCs and their contract performance clearly supports this claim.

Finally, PUCs try to impeach Producer witnesses by alleging that their testimony was fabricated, false or misleading. (PUCs Br. at 171, 238, 239). These are extreme accusations which are as uncalled for as they are unfounded. Apparently, PUCs argue, when witnesses inaccurately respond to questions outside their scope of knowledge, they have devised a scheme to fabricate their statements. This line of argument is utterly inappropriate and is not an aid to furthering the ends of justice. PUCs use this premise to assert additionally that the statements of the Producers' cumulative witnesses would have been false, since their testimony was consistent with other Producer statements. (PUCs Br. Appendix at 3) This is a ludicrous argumnet which is based on an incorrect premise and has no legal basis.

In sum, the Producer evidence was credible and paralleled that of Northern. Their overwhelming testimony was that they intended ARCs to trigger payment of NGPA ceiling prices. Protestors have not introduced even a scintilla of direct evidence to the contrary. Producer testimony not only preponderated here, but did so conclusively. In seven years of discovery, Protestors have not found a single document or witnesses to support their contentions.

V. *Course of Dealing Under the Commercial and Regulatory Context*

As the Court explained in *Pennzoil II*, to determine proper ARC meaning extrinsic evidence of the commercial and regulatory context as well as the parties' course of dealing during the time when ARCs were negotiated, must be evaluated. A course of dealing is defined as a "sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." U.C.C. § 1-205(1). Such evidence is important because the Order No. 23 series of cases are based on the relationship between private producer-pipeline contracts to the public regulation of the natural gas industry. *Associated Gas Distributors*, 810 F.2d at 228. During this proceeding, Northern and Producers introduced substantial evidence on course of dealing, commercial and regulatory context. It must be noted at the outset that Protestors presented no evidence regarding these factors.

As explained by Mr. Jack Earnest (IP-R-1), an expert witness presented by Producers, the Parties' use of ARCs was an outgrowth of both Commission regulations and competition in the natural gas industry. When ARCs were first used in the late 1960s and 1970s, the country was in a period of tight gas supplies. By using ARCs, interstate pipelines could offer Producers the highest federally authorized gas price so that they could compete with intrastate pipelines, who were not subject to federal regulation, for gas which was available. Mr. Earnest speaks from experience with both the pipeline and producer segments of the industry, the two segments involved in negotiating and administering gas

supply contracts and their ARCs. Mr. Earnest is found to be completely knowledgeable and credible.

Initially, the Commission regulated the sale of gas by the producers through an individual cost-of-service formula. *Pennzoil II* at 1132 n.5. This approach was ultimately unworkable, and consequently was replaced by a method whereby gas sales within geographical areas were subject to Commission-set ceiling prices. *Id.; See In re Permian Basin Area Rate Case,* 390 U.S. 747 (1968). (NNG-R-1 at 9-10) Thereafter, the Commission abandoned this approach and established national ceiling rates. In order for ceiling rates to apply to a particular transaction, jurisdictional gas must have been sold at a price authorized by the contract in issue. *See United Gas Pipe Line Co. v. Memphis Light, Gas & Water Div.,* 358 U.S. 103 (1958). Therefore, the individual contracts still established prices, but these prices were subject to the established ceiling rates. *Pennzoil I* at 372.

The Commission promulgated further rules that required strict compliance with its pricing guidelines. On March 31, 1961, the Commission stated that contract clauses establishing price changes would be inoperative unless they tracked certain enumerated provisions. Order No. 232-A. 25 FPC 609 at 610 (1961). In 1962 the Commission amended that order, which is still in effect, to provide that the entire contract would be rejected if it contained an impermissible price change provision. Order No. 242, 27 FPC 339 (1962), *vacated Texaco, Inc. v. FPC,* 317 F.2d 796 (10th Cir. 1963 *reversed sub nom, FPC v. Texaco Inc.,* 377 U. 33 (1964).

The Commission amended its regulation again in 1966 by allowing parties to include language in gas purchase contracts which evolved into what is now commonly

referred to as an area rate clause. *See* Order No. 329, 36 FPC 925 at 927 (1966). Specifically, the 1966 amendment allowed for:

> Provisions that permit a change in price to the applicable just and reasonable area ceiling rate which has been, or which may be, prescribed by the Commission for the quality of the gas involved. *Id.*

Order No. 329 was codified in 18 C.F.R. § 154.93, and remains to this date.

Area rate clauses are a type of indefinite price escalator clause. Indefinite price escalator clauses permit automatic upward price adjustments upon the occurrence of some specified event. *Pennzoil I* at 366. In the past the FPC has permitted ARCs, with language that closely tracked § 154.93, to escalate contract prices to national ceiling rates, ceiling rates for qualifying sales of small producer gas, rollover contract gas, and flowing but unregulated gas. *See Id.* at 367.

Since ARCs would be inoperative unless they closely followed Commission regulations, pipelines and producers initially drafted the clauses so that they would have conforming provisions. (Tr. 815; IP-R-1 at 11, 12) The Court noted in *Pennzoil I* at 389, that it was reasonable for an ARC tracking Commission regulations to allow for collection of NGPA prices.

Many ARCs used in Northern's contracts mirrored the language which was permitted by Commission regulations. Some of the clauses, however, did not track the regulation but the Commission nevertheless accepted them for filing. (*See* Tr. 816) In all instances, Northern and Producers intended ARCs to trigger payment of interstate ceiling rates, including NGPA prices, irrespec-

tive of variations in the language inserted by the Parties. (Tr. 2860; NNG-R-1 at 14; NNG-R-11 at 5-6; NNG-R-10 at 8) Such an intent was not unreasonable as the Court found in *Pennzoil I*, given the overwhelming consistent testimony by the Parties to that effect, and their Performance under these agreements.

Northern's claimed intent is also supported by the correspondence which the Company sent relating to its gas purchase contracts. When the NGPA was enacted, Northern received inquiries in regard to whether ARCs would permit escalation to NGPA ceiling prices. On each occasion, the Company responded that such an escalation would be permitted. For example, during contract negotiations with MAPCO, Inc., Mr. Brune informed MAPCO by letter that under ARCs MAPCO "would be able to collect the highest price if regulation of gas under the contract continues . . . ." (NNG-R-23)

The course of dealing, and the regulatory and commercial context in which negotiations were conducted clearly supports the Parties' contention that they intended ARCs to authorize and require payment of NGPA ceiling prices. As was discussed above, the parties intended ARCs to allow interstate pipelines to pay, and producers to collect, all ceiling prices pursuant to federal regulation. Such a regulatory framework allowed interstate pipelines to compete for the limited gas supplies available. ARCs also enabled interstates to lock into long-term contracts to secure an adequate gas inventory and alleviated uncertainties among producers about collection of price increases resulting from subsequent regulations. This was especially important since contracts could not be terminated without prior Commission abandonment authority.

Protestors have unconvincingly argued various theories in opposition. First, they assert that the Commission's regulations imposed a limited concept such that contemplating collection of ceiling prices, other than specific area or national rates, established by law was a "prohibited intent." (PUCs Br. at 289) This argument is nothing more than a collateral attack on Order No. 23. and, in any event, is absurd on its face. Nothing prohibited any parties from contracting for whatever price they intended. The law and Commission regulations only limited that which could be paid and collected. If the Parties intended payment to escalate to an unknown future price, that escalation could be effective when the future price became authorized. In *Pennzoil I*, the Fifth Circuit explained that ARCs which tracked § 154.93 "could constitute sufficient authority to collect NGPA prices." *Pennzoil I* at 389. Protestors have failed to introduce even a scintilla of evidence in support of their "limited" intent theory. Not a single witness agreed with Protestors' characterizations of their "limited" intent. The argument is without support or merit.

Second, the PUCs argue that the Commission acted to somehow prohibit ARCs calling for the highest price allowed by law when they addressed certain comments filed by Phillips Petroleum Company in Order No. 329, 36 FPC 925, 926 (1966). (PUCs Br. at 283-284) The PUCs' position is a complete mischaracterization of the comments and the Commission's response. Phillips commented on two concerns in regard to the Commission's rulemaking to amend Section 154.93: that the Commission's regulation limited price escalation only to the just and reasonable *area* rate; and that the Commission's regulation appeared to be inconsistent with

provisions of Opinion No. 468, which allowed producers to file for both special relief and area rates. 36 FPC at 926. The Commission rejected the first comment because it was an objection to the area rate approach adopted in Opinion No. 468 [34 FPC 159], and all such arguments were already fully addressed and rejected in that proceeding. In regard to the second argument, the Commission stated that the current rate would not preclude filings for special relief from the area rate established in the Permian Basin area rate proceeding. *Id.* There was no mention that the Commission intended to prohibit collection of NGPA ceiling prices. It only intended to preserve its area rate procedure by not altering the proposed regulation.

Third, Protestors assert that ARCs were intended to have a limited intent since there was a lack of buyer competition in the natural gas industry. (PUCs Br. at 302, 309) The PUCs introduced no direct case to support their view of the competitive environment. Also, they cite certain witnesses' statements out of context in attempted support of their claim, yet fail to address the overwhelming evidence indicating that competition was, indeed, a key factor which allowed producers to demand payment of all federal ceiling prices pursuant to ARCs. For example, on page 309 of their brief, the PUCs assert that Mr. Bulla's statement that Northern did not buy much gas in competition with intrastates proves a lack of competition. This is a distortion of Mr. Bulla's overall testimony. Both in his prefiled direct testimony and at hearing he explained that intrastate competition was an important part of increasing interstate prices. (Tr. 1690; NNG-R-10 at 4)

As was recognized by the Commision:

> [t]he excess of current demand for natural gas over the current supply became apparent in the latter part of the 1960s and increased progressively through the 1970s.

Gas Research Institute, Opinion No. 11, 2 FERC ¶ 61,259, at p. 61,616 (1978). By using ARCs, interstate pipelines could pay the highest price permitted by federal regulation, allowing them to compete for the limited gas supplies with intrastate pipelines. If Northern did not include ARCs in its contracts, it would have been difficult to establish purchasing agreements with Producers, and this would have led to serious gas supply difficulties for the Company. (See NNG-R-8 at 7)

Fourth, the PUCs claim that since ARCs were used in contracts when gas was already dedicated to Northern, such as in rollover contracts and in "upgrade" amendments, that the clauses were used when there was no such need to pay higher prices. (PUCs Br. at 310) There was substantial evidence, however, that ARCs were provided in rollovers and contract amendments in exchange for a new dedication or additional development of the existing dedicated acreage. (Tr. 1037, 1033, 1205, 1323-1324, 1335, 1410-1411) By offering ARCs as an incentive, therefore, Northern was able to compete with other pipelines and acquire adequate long-term dedicated gas reserves. Also, the issue here is not whether Northern prudently used ARCs in its contracts, but only what they intended ARCs to mean.

Fifth, Protestors contend that because Northern's Mr. McCarthy stressed that careful drafting of contract clauses was important, that ARCs could not have an expansive meaning to cover prices set by an authority other than

FERC or the FPC. Although many ARCs do not mention Congress or the NGPA, the lack of reference was not because the Parties did not intend ARCs to be triggered by NGPA pricing. Instead, it was because the Parties expressed themselves in accordance with the known regulatory structure at the time ARCs were executed. (*See generally* TEX-R-1 at 9; CHV-R-1 at 9; AHC-R-1 at 4; SPI-R-1 at 7; EXX-R-1 at 12; SRC-R-3 at 4) At the time of contract execution, they intended ARCs to be triggered by any federally set ceiling prices, but only contemplated rate setting by the FPC or the FERC. The fact that an ARC may not mention legislatively set rates does not preclude the triggering of such prices. As the Court stated in *Pennzoil I* at 389, it is not unreasonable for ARCs closely tracking Commission regulations to trigger payment of NGPA prices. In addition, as was believed *supra*, the Parties reasonably believed that ARCs would be inoperative if they did not track at least generally the language used in the Commission regulation, which did not and still does not refer to Congress or the NGPA.

Sixth, Protestors have also theorized that since Producer and Northern witnesses did not agree that collection of "special relief prices" would be collectable pursuant to ARCs, that this somehow refutes the contention that ARCs allowed collection of NGPA ceiling prices. (Staff Br. at 68; PUCs Br. at 171-175) This is another of PUCs' absurd arguments. Special relief is a procedure initially used by individual producers, who contracted for gas at above-ceiling rates, to obtain higher gas prices by showing that out-of-pocket production costs exceeded revenues under their current area rate. Opinion No. 468, 34 FPC 159, 226 (165). As time passed, these procedures were also used for obtaining higher prices for specific new drilling programs on previously dedicated acreage.

Significantly, special relief rates were applicable only to individual producers who followed proper procedures, and only when above-ceiling prices were in effect pursuant to an individual pipeline-producer agreement. ARCs only apply to automatic escalation of federally established ceiling prices. Therefore, rates set under special relief procedures are outside of the scope of pricing pursuant to ARCs. It should be noted that there never was a designation of a special relief *price*. There were special relief procedures whereby relief *from* ARC pricing could be obtained. Protestors confuse and distort this distinction.

Similarly, PUCs questioned witnesses in regard to recovery of prices set by "optional procedures." This was a method whereby producers could obtain higher rates outside the generally-applicable rate structure by "one-shot" Commission approval pursuant to Sections 4 and 7 of the Natural Gas Act. Order No. 455, 48 FPC 218, *reh'g denied*, Order No. 455-A, 48 FPC 477 (1972), *modified*, 502 F.2d 461 (1974), *rev'd* 424 U.S. 494 (1975). Under this policy, two of the Commission's requirements were that the contract in question not contain an indefinite pricing clause, and that an acceptance of the "one-shot" certificate would waive all rights to future rate increases. Therefore, this procedure was not even available to parties with contracts containing ARCs. Also, since rights to future rate increases were waived if the "one-shot" certificate was accepted, this is clearly contrary to the opepration of ARCs, which allow for automatic collection of escalated prices. Optional procedure pricing is, consequently, unrelated to the meaning of ARCs.

Protestors also argue that Northern could not have had an intent to automatically pay ceiling prices because many ARCs stated that Northern had a right to intervene when

a new ceiling rate was established. (PUCs Br. at 148-152) This contention is related to a two-part theory: 1) that inclusion of this right shows an intent by Northern not to pay Congressionally set rates; and 2) that the rates would not be effective unless established in an administrative proceeding where Northern had a right to intervene, and that since Congress established NGPA prices, ARCs do not apply to NGPA rates. PUCs fail to offer any support for these assertions. The evidence shows that Northern included intervention rights in its clauses because some producers were not aware that pipelines could intervene in area rate proceedings, and by stating this right Northern sought to avoid potential breach of contract actions if intervention were exercised. (Tr. 3031) There is no indication that Northern ever protested payment of new ceiling rates, but only that this right was reserved. In regard to the second part of the theory, a right to intervene does not exist only in administrative proceedings. It could involve many procedures such as providing oral testimony, or even offering written comments to a Congressional committee. There was no indication that the right to intervene was a pre-condition to paying escalated rates at all, and certainly not that the right would be limited to administrative procedures. The Parties themselves disclaimed such an intent. PUCs also speculate that Northern negotiated to replace a redetermination clause with an ARC under a contract with MAPCO, so that it could intervene in proceedings to increase rates and thereby limit price escalations. (PUCs Br. at 281) The evidence clearly shows, however, that by adding ARC language Northern allowed MAPCO "to collect the highest price if regulation of gas under the contract continue[d] . . ." Also, in regard to the requirement that ARCs only apply to administratively-set gas price increases, the FERC

has noted that it will not invalidate a contract clause merely because Congress set the regulated rates when administrative action was originally contemplated by the parties. Opinion No. 77, 10 FERC ¶ 61,214, at p. 61,-399 n.15.

Finally, PUCs claim that Northern could not have intended to enter ARCs allowing for collection of NGPA ceiling prices, because they did not intend to contract for unmarketable gas. (PUCs Br. at 321-325) PUCs argue that since NGPA prices were eventually raised to prices above unregulated rates, the gas became unmarketable and caused Northern to lose gas load. (PUCs Br. at 325) Marketability of gas, however, is not measured by evaluating gas purchase contracts individually. To determine whether a pipeline's gas is marketable, the Weighted Average Cost of Gas (WACOG) and the pipeline's overall "rolled-in" gas must be marketable. PUCs do not address problems with Northern's WACOG or its "rolled-in" gas prices, and offer no method of determining marketability. They merely state the obvious, that no company intends to acquire an unmarketable product. Even if Protestors could prove that the gas was unmarketable, however, this would not change Northern's intent when the ARCs were entered into. Although the results of contract performance may not ultimately turn out as expected, this does not affect the contracting parties' initial intent. The contracting intent was to include ARCs automatically effecting regulated price escalations. The *motivation* for doing so was for Northern to obtain a marketable, competitive product, and for the Producer to obtain the highest permissible price. Risks thus were allocated. Subsequently, as discussed *infra,* Northern became dissatisfied with that which it had undertaken. That dissatisfaction, however, cannot alter its original intent.

Staff argues that Northern had a policy not to "grant" ARCs unless economic hardship was shown by the producer. (Staff Br. at 53-55) This is a distortion of the record. Staff cites correspondence from Texaco Inc. to Northern, and from Northern to Cities Service Oil Company to support its view. These letters do discuss the problems with the then-existing low gas prices. There was no showing, however, that the law prices induced Northern to agree to ARCs. Indeed, as Staff pointed out on brief, Northern sought to pay the lowest reasonable price for gas. (Staff Br. at 52) Northern's use of ARCs was actually induced by the need to assure long-term gas supplies for its customers. As was stated in the Texaco letter to Northern,

> . . . [q]uite frankly the price increases are in the best interest of your customers because they serve to extend the economic life of the leases thus avoiding premature abandonment and bringing additional gas to market.

(P-R-29) In any event, regardless of Northern's reasons for entering ARCs, the Company's intent was to pay any federally authorized ceiling price under the clause, and that is the issue that we are concerned with here.

In conclusion, the Parties' course of dealing under the commercial and regulatory context indicates that they intended ARCs to trigger payment of NGPA rates. Commission regulations and market forces had a great impact on the Parties' initial use of ARC language, and their subsequent dealings pursuant to the clause. Protestors' arguments to the contrary are meritless and are largely based on distortions of both the record and precedential authority.

VI. *Course of Performance Under the Commercial and Regulatory Context*

Under Section 2-208(1) of the U.C.C., course of performance is defined as follows:

> Where the contract for sale involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement.

Course of performance evidence tends to be indicative of actual contract meaning. As was stated by Professor Williston: "[t]he practical construction placed upon a contract by the parties themselves constitutes the highest evidence of their intent that whatever was done by them in the performance of the contract was done under its terms as they understood and intended same should be done." 4 Samuel Williston. *A Treatise on the Law of Contracts*, § 623 (3d ed. 1961)

During this proceeding, Northern and Producers have presented substantial testimony in regard to the Parties' course of performance pursuant to the ARCs in issue. As is the situation with all other issues, Protestors have not presented a scintilla of affirmative evidence to support their contrary theories. A proper understanding of the Parties' course of performance requires an analysis of their actions under the commercial and regulatory environment in the following three time periods: 1) pre-NGPA; 2) from December 1, 1978 to January 1, 1985; and 3) from January 1, 1985 to the present.

A. Pre-NGPA Course of Performance

The Parties' course of performance prior to enactment of the NGPA shows that both Northern and Producers treated ARCs as triggering payment of the applicable ceiling price established by federal regulation. (CHV-R-1 at 10, 13; EXX-R-1 at 10; IP-R-3; Tr. 2797) Such performance was consistent with their intent under the regulatory context as will be shown below.

The regulatory scheme which was developed by the FPC/FERC shows that interstate pipelines are to automatically pay the highest applicable rates under the area rate clause. When the Commission adopted a series of pre-NGPA ceiling prices, those rates were consistently paid, although the ARCs typically tracked Commission regulations calling for payment of "area ceiling rates". (emphasis added) For example, the FPC allowed producers and interstate pipelines to rely on ARCs as authority for payment of nationwide ceiling prices, which were established in 1974. *Pennzoil I* at 367. The Commission also authorized contracting parties to pay ceiling prices established based on the concept of vintaging gas as "old" or "new", pursuant to the clause. See Order No. 451, *FERC Statutes and Regulations* ¶ 30,701, at p. 30,200 n.14 (1986). Furthermore, ARCs have triggered payment of ceiling prices set for small producers. Opinion No. 742, 54 FPC 853, 858 (1975). In addition, the Commission allowed ARCs to provide authority for prices of "old" gas, gas flowing prior to January 1, 1973, to escalate to nationwide ceiling rates established for "new" gas, and this pricing structure was approved by the Fifth Circuit Opinion No. 749, 54 FPC 3090 (1975); *Shell Oil Company v. FPC*, 520 F.2d 1061, 1077 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976). The

Commission has also permitted escalation to new ceiling rates established for rollover contract gas and for sales of flowing but undedicated gas pursuant to ARCs. *See Pennzoil I* at 367. Lastly, the Commission has approved payment of nationwide ceiling price escalations set for gas flowing subsequent to December 31, 1974, under the clause. Opinion No. 770, 56 FPC 509, 516, 578-584, *modified*. Opinion 770-A, 56 FPC 2698 (1976). Significantly, these prices were based on both cost and non-cost factors, and were paid irrespective of the ARC referring to payment of "*area* ceiling rates."

The evidence shows that Northern and Producers consistently relied on this pattern of regulation as authority for triggering of ceiling prices under ARCs, including NGPA rates. (NNG-R-1 at 12). Both Northern and Producers testified that, consistent with those Commission rulings, nationwide ceiling prices, small producer prices and ceiling rates established for "old" and "new" gas were paid under area rate clauses.

Protestors advance two arguments in reply to the Parties' contentions on pre-NGPA course of performance. First, as was discussed in Part V, they claim that since Northern did not pay rates established by special relief procedures without a contract amendment, it did not intend to pay NGPA prices pursuant to ARCs. (*See* PUCs Br. at 172-175; Staff Br. at 62) As was discussed in Part V, special relief procedures allowed for payment of above-ceiling prices and were set entirely outside the realm of ARC operation. These prices were not part of the Commission's scheme of establishing ceiling rates. Furthermore, if Northern intended ARCs to provide authority for payment of special relief rates, there certainly was no need for them to amend contracts to permit payment of such rates.

Second, PUCs contend that since the Parties were limited to following Section 154.93 when drafting ARCs, that the clause "merely provided for [payment of] prices found 'just and reasonable' under the Natural Gas Act in area or nationwide rate proceedings." (PUCs Br. at 295) Any ARCs referring to allowance of "just and reasonable" rates, however, were only phrased this way to reflect accurately the then-existing regulatory framework. When those clauses were entered, the Parties intended ARCs to allow for payment of the highest ceiling prices, yet only contemplated price setting under the Natural Gas Act. This was certainly proven by the manner which Commission rulings allowed for payment of various ceiling prices under the clauses, regardless of whether the ARC specifically referred to payment of these rates, as was discussed above.

Protestors also tangentially infer that ARCs only authorized payment of rates established in formal evidentiary hearings. The Commission has established and the Parties have paid, however, ceiling prices set by rulemaking proceedings and through approval of settlement agreements. *See Shell Oil Company v. FERC*, 520 F.2d 1061 (5th Cir. 1975), *cert. denied*, 426 U.S. 941 (1976); *See, e.g.*, Opinion No. 598, 46 FPC 86 (1971).

The Partes' evidence of pre-NGPA course of performance under the commercial and regulatory context clearly demonstrates that it was intended for ARCs to trigger payment of all prices established pursuant to the pattern of ceiling rates set by federal regulations. The evidence indicates that such rates were to be paid regardless of whether: 1) they were cost-based; 2) they were set in a rate proceeding, rulemaking or settlement; or 3) the ARC at issue only referred to the setting of "area ceiling rates." (See NNG-R-1 at 11).

B. Course of Performance From December 1, 1978 to January 1, 1985

In the fall of 1978, upon enactment of the NGPA, Northern determined that its contracts containing ARCs required payment of NGPA ceiling prices effective December 1, 1978. This decision was based on the Company's intent when it entered the clauses in issue.

Mr. Dienstbier, the Vice President of Northern's Supply Division, conducted an investigation in 1978 to evaluate whether payments of NGPA ceiling prices were intended and authorized under the Company's ARCs. He investigated this matter because, having been in the gas supply division for only one year, he wanted to verify the decision with more experienced gas acquisitions personnel. (Tr. 2287) During the investigation, Mr. Dienstbier consulted with members of the Supply Division staff, Mr. Reed, Mr. Guinane and Mr. Poehling, as well as with the Company's attorney, Mr. McCarthy. (Tr. 2289) Each confirmed that Northern intended through its ARCs an obligation to pay NGPA ceiling prices. Based on the investigation, Mr. Dienstbier recommended that Northern pay NGPA ceiling prices. (Tr. 2284, 2359) As was discussed earlier, Mr. McCarthy also made such a recommendation in his November 6, 1978 memorandum. Mr. McCarthy's position was based on his review of ARC language, the Parties' course of performance, commercial and regulatory circumstances and discussions with Northern personnel who confirmed his view. (NNG-R-1 at 8-9; Tr. 763-764; *See* Tr. 754; NNG-R-2) His memo was circulated to twenty-four company employees involved with gas acquisitions, none of whom expressed disagreement with his conclusions. (NNG-R-1 at 16) Northern's

ultimate decision to pay NGPA rates was based on these conclusions in addition to the recommendation of Mr. Stockman (Tr. 2372).

The evidence shows that Northern consistently paid NGPA ceiling rates from December 1, 1978 until 1985 under the contracts in issue. An April 9, 1979 memorandum from Mr. Dennis Brune, who was responsible for determining proper payments under Northern's natural gas purchase contracts, states that the Company was to finally determine the ceiling prices for NGPA Sections 102, 103, 107 and 108 gas which became effective on December 1, 1978, by June 1, 1979. (NNG-R-31; NN G-R-22 at 17-18). Northern witnesses consistently testified that such prices were paid. For example, Mr. Brune noted that the Company paid NGPA rates from the outset, although such a position was initially contrary to that stated by the FERC. (*See* NNG-R-28) Based on discussions with Producers and Northern personnel, Mr. Brune recognized that ARCs "obviously" obligated the Company to pay NGPA ceiling prices. (NNG-R-22 at 1-2) In addition, Producers have harmoniously testified that Northern paid NGPA prices as of December 1, 1978. (AND-R-1 at 2; APC-R-1 at 6; BHP-R-1 at 5; CPC-R-1 at 5-6; TEX-R-16 at 8; CHV-R-24 at 2-3)

Although the Parties' course of performance as of December 1, 1978, clearly shows that they intended ARCs to trigger payment of NGPA prices. Protestors contrive a series of unfounded arguments in their rebuttal briefs. First, Staff contends that Northern's intent to pay NGPA ceiling prices did not originate until its policy was formulated at an October 1978 meeting among Northern personnel. (Staff Br. at 47-49) Staff claims that the Company's intent in 1978 was separate from that existing

when ARCs were entered into. All of the proffered evidence, however, indicates that a contrary scenario existed. Mr. McCarthy's memorandum and the overwhelming testimony show that Northern's decision to pay NGPA prices was based on its original intent, and was not separately formulated. In fact, the purpose of the Company's fall meeting was to determine whether NGPA payments would be consistent with its *initial* intent.

Second, Protestors theorize that Northern's payments of NGPA ceiling prices were conditional because in correspondence the Company explained that Producers were under a refund obligation. (PUCs Br. at 336-337) The refund obligation was imposed for two reasons: 1) The Commission's Order No. 23 procedures specifically provide that payments by a pipeline were subject to refund. Order No. 23, Docket No. RM79-22, *FERC Statutes and Regulations. Regulations Preambles* 1977-1981 ¶ 30,040, at p. 30,316 (1979); and 2) because of the uncertainty existing in regard to Commission regulations allowing ARCs to trigger payment of NGPA ceiling prices. Northern's insistence on a refund obligation, therefore, was clearly based on the impact of Commission regulations. There was no evidence submitted to show that the payments were conditional pending Northern's decision on its ultimate intent. The Company's intent was formed when entering ARCs and did not vary regardless of FERC rulings, as was noted above.

Third, Protestors argue that since Northern required consideration from Producers before it would agree to amend its ARCs to provide expressly for payment of NGPA prices, this shows the Company's initial intent under unamended clauses did not trigger payment of

NGPA rates. No evidence or legal precedent, however, supports such a finding. Northern believed unamended ARCs allowed for payment of NGPA prices and did not require reference to the NGPA before making such payments. The overwhelming testimony in this case shows that ARCs were only modified at the insistence of Producers, to alleviate any doubt they might have that NGPA rates were authorized by the clause, especially in light of the Commission's original conclusion, since abandoned, that specific NGPA reference was necessary. (*See* Tr. 3920-3921) Also, payment of consideration was required from Producers because this had been the policy of Mr. McCarthy for *all* contract amendments. (Tr. 791)

Fourth, Staff and PUCs attack the Parties' claimed intent because Northern would not amend its ARCs to include negotiated contract language under Commission regulation 271.702(a)(1), which allows payment of NGPA Section 107 tight sands gas incentive prices, without first receiving consideration. (PUCs Br. at 377-380; Staff Br. at 60-61) (PUCs focus on two factors: 1) some Producer witnesses believed Northern should have provided amendments without consideration (PUCs Br. at 133); and 2) statements made at an officers meeting on October 20, 1981, showed a contrary intent. (*See* P-R-12)

Whether or not the Parties intended to pay tight sand prices, however, is irrelevant here. As Sun Exploration and Production Company convincingly explained on brief:

> PUCs conveniently disregard the fact that "qualification" for the NGPA section 107(c)(5) maximum lawful price requires a negotiated contract price. By Commission regulation, an area rate clause

> cannot authorize collection of the tight sands prices without qualification through a negotiated contract price, which price supercedes and nullifies any reliance upon an area rate clause as a source of contractual authority to collect the maximum lawful price for that category of gas. The whole issue is, for Protestors, a nonstarter.

(Producers' Rebuttal Br. at Appendix 7); *See Pennzoil v. FERC*, 671 F.2d 119, at 123 n. 14 (5th Cir. 1982); *See generally Midwest Gas Users Association v. FERC*, 833 F.2d 341 (D.C. Cir. 1988). Clearly, since ARCs apply to automatic price escalations and Section 107 tight sands gas pricing is based upon a negotiated gas price, tight sands pricing is not within the realm of NGPA prices automatically triggered by ARCs.

Furthermore, the October 20, 1981 meeting minutes do not negate Northern's intent. The minutes show that the Company's position on tight sands gas differed from its intent under ARCs and that it would *consider* changing the clause's language only if pressured by a producer. (P-R-12) (emphasis added) In sum, Northern's position regarding tight sands gas is unrelated to the issue here and, in any event, does not indicate a contrary intent by the Company.

Fifth, Protestors assert that Northern did not intend to pay NGPA Section 108 stripper well gas prices pursuant to ARCs. (Staff Br. at 61; PUCs Br. at 463-464) As support for this claim, PUCs point to evidence that Northern sought to eliminate payments of Section 108 rates in post-NGPA agreements. (See P-R-37) There is no indication, however, that Northern pursued any action to cease payments of such prices under ARCs which they already entered into. Indeed, if the Company

had no such obligations under pre-existing ARCs, there would have been no need to specifically exclude that category of gas in post-NGPA contracts.

Also, Staff argues that Northern could not have intended to pay the highest prices allowed by law, since it inserted "Minneapolis Clauses" to restrict such payments. (Staff Br. at 59) Minneapolis Clauses were used by Northern subsequent to the NGPA to place some limit on the Company's obligation to pay NGPA rates pursuant to ARCs. Basically, the clause limited the application of ARCs to competitive fuel pricing. There would have been no need to utilize such a restrictive clause, however, if Northern could have limited gas prices under the ARC itself. Indeed, Northern's attempts to seek some price protection under ARCs shows that the clause did not allow the Company to limit gas prices, but that separate action was required to obtain price relief.

Sixth, Protestors contend that payment of NGPA prices was not intended because Producer witnesses could not agree whether production-related costs under Secion 110 of the NGPA were payable pursuant to ARCs. (PUCs Br. at 177-179; Staff Br. at 61) This argument, similar to the majority of Protestors other assertions, is irrelevant to this case and lacks evidentiary and legal support. The Commission has established a separate procedure too allow parties an opportunity to prove whether or not an ARC permits recovery of delivery allowances under NGPA Section 110. See Order No. 473, *FERC Statutes and Regulations* ¶ 30,747 (1987). As was noted at the hearing, the collection of production-related costs does not reflect directly upon the Parties' intent relating to generally-applicable ceiling

prices for gas. (Tr. 4158-4163) The issue here involves the cost of gas, in particular, payment of NGPA gas prices. Payment of production-related expenses is not a gas cost, and, therefore, is outside the scope of this case.

Seventh, Protestors question Northern's intent by claiming that if the Company intended to pay the highest price allowed by law, it would pay Order No. 451 prices under the ARC. (Staff Br. at 61-62) *See* Order No. 451, *FERC Statutes and Regulations* ¶ 30,701 (1986). Similar to NGPA Section 107 tight sands prices, however, certain procedures must be followed before such rates can be paid. The contracting parties, under Order No. 451 procedures, have an opportunity to renegotiate their contract to obtain the alternative ceiling rates, regardless of the parties' initial intent under the particular ARC. Since both parties must renegotiate to allow these prices to apply, the rates are unrelated to automatic price escalation provisions, the issue here.

Finally, Protestors attempt to attack Northern in this case by distorting certain findings and statements from Phase II of this proceeding. (PUCs Br. at 205, 229, 333, 380-381) Phase II involved a dispute between Northern and a producer, Cities Service Oil and Gas Corporation, regarding whether two 1963 natural gas purchase contracts contained ARCs. 31 FERC ¶ 61,011 (1985), *reh. denied*, 34 FERC ¶ 61,375 (1986). In that case, Northern argued that Cities was not entitled to a rate increase because the clauses in issue were not ARCs at all, but rather, were fixed-price contract clauses. The issue of intent was only explored in regard to whether the clause was intended to be an ARC. It was ultimately found that the clauses were not ARCs.

In Phase II, Cities asserted that the Court should not

consider extrinsic evidence since the clauses were clearly ARCs. Protestors, therefore, argue that in this case Producers believe the contracts in issue should be interpreted without evaluating the extrinsic evidence. (PUCs Br. at 205, 229) In Phase II, however, Cities argued the dispute centered on ambiguity in the words contained in the clause. Northern argued there was no ARC in the contract. In this proceeding, we are concerned with the meaning intended to be placed on the clauses in light of the Parties' performance and dealings, as well as the commercial and regulatory environment. The Parties admit that the clauses being construed here are ARCs. Therefore, any extrinsic evidence submitted regarding the Parties' intent must be reviewed. Protestors' reliance on statements and findings in Phase II is misplaced and will be given no weight here.

Similarly, both Staff and PUCs rely on, and distort statements in, a proposal exhibit which was identified but not received, asserting that Northern previously expressed a different intent under ARCs in *Premier Resources Ltd. v. Northern Natural Gas Co.,* 616 F.2d 1171 (10th Cir. 1980). (*See* P-R-56) In a *Premier* deposition, Mr. Stockman of Northern explained that ARCs required payment of rate increases set by the FPC, and, therefore, Protestors argue that only FPC/FERC price escalations were intended to be paid pursuant to the clause. (*See* P-R-77) When Mr. Stockman was deposed, however, he never explained that *only* FPC rates should be paid. Also, at the time, NGPA prices were not in existence, and the FPC was the only authority establishing gas rates. Therefore, it was impossible for the Company to have specifically considered paying Congressionally set prices. It was, however, within its intent to pay all applicable

ceiling rates. Furthermore, Protestors' reliance on P-R-56, which was not made part of the record, is highly inappropriate and such argument will not be considered. It is mentioned here only to foreclose the later argument that something in Protestors' briefs went unnoticed.

The course of performance evidence overwhelmingly demonstrates that Northern and Producers intended the ARCs in issue to trigger payment of NGPA ceiling prices. NGPA ceiling prices were paid by Northern as of December 1, 1978, and as the testimony and documentary evidence clearly indicates, such payments were made because it was consistet with the Parties' intent when entering the contracts at issue. The arguments raised by Protestors are, for the most part, irrelevant, and in their entirety, unpersuasive.

C. Course of Performance From January 1, 1985 to Present

In 1984, Northern sought to begin paying prices lower than the NGPA ceiling rates required by its ARCs. Northern tried a series of methods to obtain lower prices such as seeking price-limiting amendments to contracts containing ARCs (P-R-62; P-R-63; P-R-64; Tr. 2204, 2418-19, 5042, 5044), and invoking other contract provisions such as those permitting reduction of purchases. (Tr. 4996-98, 4791, 5632) Beginning January 1, 1985, Northern began paying these lower prices (Tr. 2419); in some cases the Company breached the pricing terms of its gas purchase agreements (Tr. 5304, 5200-01).

Protestors assert, however, that Northern paid less than NGPA ceiling prices as of January 1, 1985, pursuant to the ARCs in issue. (PUCs Br. at 468 This argument is an attempt to support Protestors' theory

that Northern only intended to pay what they term market prices for natural gas supplies.

The problem with this contention, as is the problem with all of Protestors' theories, is that it is wholly speculative and unsupported by any evidence. Not one document or even a scintilla of testimony was proffered indicating that Northern paid less than NGPA ceiling prices as if January 1, 1985, under authority of its ARCs. Clearly, Northern paid lower rates not because of, but in spitie of its ARCs. (Tr. 832, 2243) If the ARCs empowered Northern to pay lower rates, there would have been no need to negotiate with Producers for contract amendments to decrease the price level.

Protestors had numerous opportunities to obtain evidence to show that the price reductions as of January 1, 1985, were pursuant to the ARCs in issue. Protestors were provided with voluminous documents regarding Northern's payments during this time period (Tr. 4341), and also reviewed all contracts and amendments at issue which were entered into from January 1, 1983, and thereafter. Additionally, Protestors had an opportunity to cross-examine Northern's witnesses and many Producer witnesses, as well as call these individuals as part of an affirmative case. Still, no evidence was introduced to support such a claim and the testimony of Northern and Producer witnesses shows that such speculation is unfounded. Despite Protestors' suggestions to the contrary, Northern was just one of the many interstate pipelines seeking rate reductions in gas purchase agreements on a unilateral basis.

In addition, it is obviously irrelevant that Northern attempted to renegotiate deregulation clauses covering

non-jurisdictional gas as of January 1, 1985. Northern sought to renegotiate these clauses because of an expected price "fly-up" when NGPA ceiling prices for such categories of gas were to be taken away effective January 1, 1985. Rates for these categories of gas, however, are not subject to ARCs. Renegotiation of contracts containing deregulation clauses was covered by Northern's "IPEC Plan" (P-R-14 at 6, 14; *See* Tr. 2423), which also included recognition of the problem of high-cost gas which would continue under regulation.

Protestors additionally allege that they have been denied discovery in regard to course of performance as of January 1, 1985, because of Northern's false and misleading actions. (PUCs Br. at 384-386) These allegations are unfounded. Any objections Protestors had regarding discovery or evidentiary matters should have been previously raised and if they believed the ruling incorrect, an appropriate appeal could have been pursued. In any event, Northern's payments as of January 1, 1985, have little relevance to the issue here; the Company's intent to pay all generally-applicable ceiling prices including those established by the NGPA, when entering into ARCs.

It is also significant that Northern lowered payments under all contracts containing ARCs beginning in 1985, regardless of language used in the clause. Some of those ARCs referred specifically to Congressional price-setting and the NGPA.

In sum, there is no evidence that Northern claimed its decreased payments for natural gas as of January 1, 1985, was in any way based on its obligations pursuant to ARCs. The evidence clearly shows that it attempted

to lower such payments despite its existing contractual duties and that there was no change in ARC meaning. Consequently, Northern's course of performance as of January 1, 1985 is not inconsistent with its asserted intent when entering into ARCs.

VII. Usage of Trade

Under Section 1-205(2) of the U.C.C., a usage of trade is defined as "any practice or method of dealing having such regularity of observance in the place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." *See also Pennzoil II* at 1143. It is not necessary to offer proof that each and every seller of gas observed the usage of trade, but only that the use was "observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree." U.C.C. § 1-205 (official comment 5). In each case it is a question of fact whether or not a usage of trade exists.

The Parties contend that a usage of trade was recognized among interstate pipelines and natural gas producers that ARCs would trigger payment of any ceiling rate established by federal regulation. To support this argument, they rely on the testimony of Mr. Jack Earnest, an expert on the purchasing practices of interstate pipelines and gas producers, and the collective testimony of the various Producer and Northern witnesses.

Mr. Jack Earnest held positions in the natural gas industry for a gas producer and various interstate pipelines ranging from Attorney to Chief Operating Officer, over approximately a forty year period. (IP-R-1 at 1-3) In addition, he has served as an arbitrator on matters

involving producers and pipelines on more than two dozen occasions (Tr. 2753) and has held leadership positions in the Natural Gas Supply Association and Interstate Natural Gas Association of America. (IP-R-1 at 2-3) Also, Mr. Earnest has been responsible for the drafting, negotiation, execution and administration of natural gas contracts. Because of his extensive experience with both natural gas producers and interstate pipelines, Mr. Earnest has the necessary background and knowledge to qualify as an expert as to the "regularity of observance" of ARC meaning among these entities. It is true, as Staff contends, that Mr. Earnest's expertise is only in the pipeline and producer segments of the gas industry. Staff contends, without explanation, that expertise is also required in the gathering and distribution segments to prove a usage of trade. Why this is so is not stated. Obviously, it is not so, for only the pipelines and producers negotiate contracts with ARCs. (Staff Br. at 69) Also, although the Northern and Producers witnesses were not presented as experts on the industry's use of ARCs, their combined individual testimony is given substantial consideration in deciding whether a usage of trade has been established, because they are the very people to whom Mr. Earnest ascribes a common understanding.

Based on his experience, Mr. Earnest testified that when ARCs were entered into, both buyers and sellers of natural gas recognized that the clause triggered payment of the highest price allowed by law applicable to the gas in question. (IP-R-1 at 16) He explained that to his knowledge all producers concurred with this view as did the majority of interstate pipelines. (*Id.*) Furthermore, he stated that ceiling prices were to be paid irrespective of the government authority establishing the

rates, how the rate was calculated, and regardless of the words used in the clause.

As Mr. Earnest noted, the understanding among gas industry members was so well known that ARC terms frequently were not specified during discussions and negotiations, but instead the terms "area rate clause" or "A/R" were used to signify that which everyone recognized. (IP-R-1 at 9) Consequently, what was negotiated among producers and pipelines was whether or not the ARC would be included in the contract at all; not the precise wording of such a provision. Regardless of how the clause was phrased, it always meant that the generally applicable ceiling rate was to be paid. Furthermore, although ARC wording changed over time in order to reflect the prevailing Commission regulations or industry understanding of those regulations, the difference in wording did not signal differences in intent. (*See* IP-R-1 at 12-13)

In addition to Mr. Earnest's testimony, the statements of the Northern witnesses and the fifty-seven Producer witnesses, who were cross-examined by the Protestors, show a "regularity of observance" as to ARC meaning. The Producer witnesses fairly reflected the views of gas producers generally, since they represented companies of various sizes and locations throughout the industry. As was explained *supra*, they unanimously stated that ARCs authorized them to collect the interstate ceiling price established by the federal government. (*See e.g.*, PPC-R-1 at 5; MPC-R-1 at 3; MOC-R-4 at 4-5; PZL-R-1 at 3; AHC-R-1 at 4) Producer witnesses also testified, based on their own dealings, to the common meaning of ARCs in the gas industry. For example, Mr. George Kaiser of Kaiser-Francis Oil Company explained that

there were probably more than fifty other pipelines who purchased gas from his company under ARCs, and none objected to Kaiser-Francis' right to collect ceiling prices pursuant to the clause. (Tr. 5662-5663)

Northern's testimony also indicates that this trade usage existed. It was shown throughout this proceeding that Northern intended to pay the highest applicable ceiling price for gas subject to ARCs. Also, the Parties' position on ARC meaning parallels that taken by the Interstate Natural Gas Association of America (INGAA) in Docket Nos. RM79-3 and RM79-22. (*See* IP-R-2) Finally, in Order No. 23-B [*FERC Statutes and Regulations, Regulations Preambles* 1977-1981 ¶ 30,073], twenty-three interstate pipelines, which accounted for over 90% of the total volumes of natural gas purchased from independent producers in 1977, made evidentiary submissions acknowledging that they intended ARCs to allow payment of NGPA prices. (IP-R-1 at 21-24; *See also* IP-R-11) Each of these twenty-three companies, including Northern, have also manifested such an intent in formal pleadings with the FERC.

Although Protestors were unable to introduce one witness or even an iota of evidence that any person in the trade had a contrary view, they have advanced a series of arguments in rebuttal. First, they contend that a usage of trade does not exist in regard to NGPA rates because statutory rates were not triggered by ARCs prior to enactment of the NGPA, but that only NGA just and reasonable rates were permitted. (PUCs Br. at 455) This argument is simply a variation of an earlier assertion which was already disposed of, that the Parties only intended to pay just and reasonable rates because

many clauses only referred to such pricing. The Parties' true intent, as has been repeatedly explained, was to allow for payment of generally applicable ceiling prices. Despite the words used in some clauses, natural gas producers and interstate pipelines had a "regularity of observance" of paying and receiving the interstate ceiling price pursuant to ARCs, including NGPA rates. There was not the slightest suggestion in all of the testimony that only just and reasonable rates, however they are defined, were intended. Clearly, Protestors believe that a just and reasonable rate must be set in an administrative proceeding and must be cost-based. They never come to grips with the obvious fact that area, national and small producer rates, although administratively set, had incentive components, and that NGPA rates are, by Congressional definition, just and reasonable themselves.

Second, PUCs contend that such a trade usage could not have existed because it was unlawful to collect NGPA ceiling prices when ARCs were entered into. This argument is based on the PUCs' claim that ARCs only triggered payment of rates specifically referred to in Commission regulations. (PUCs Br. at 424) The evidence introduced here, however, shows that as to producers and pipelines, the clause had an expansive meaning covering all federally-established ceiling prices. Obviously, contracting parties did not specifically contemplate payment of NGPA prices before such rates existed, but they did intend for the highest applicable rate to be paid at all times.

Third, Protestors assert that since the Commission did not find a usage of trade in Order No. 23, no such

usage may be found in this proceeding. This argument is absurd and unfounded. A usage of trade is a factual determination made on a case-by-case basis. Order No. 23 was a rulemaking, where factual findings are not determinable. In this case, the requisite facts have been introduced to establish a trade usage. The failure of a trade usage to be found in Order No. 23 has no bearing here.

Fourth, PUCs attempt to impeach Mr. Earnest's testimony based on a prior proceeding where he offered his expert opinion on trade usage, *UGI Corp. v. Amoco Production Co.* No. 80-1421 (E.D. Pa. August 1, 1984) (unpublished). (PUCs Br. at 424-425) In that case, the Court found that a trade usage did not exist throughout the entire natural gas industry including LDCs such as UGI, because Mr. Earnest could only testify as to usage among interstate pipelines and producers, and LDCs often took positions opposing those of these entities. Here, however, we are concerned with the usage among pipelines and producers, and Mr. Earnest's expert testimony is certainly relevant and credible as to their understanding of ARCs.

Protestors also advance various other arguments in an attempt to attack Mr. Earnest's testimony, none of which are supported in any manner. They fault Mr. Earnest for not being familiar with the specific intent of individuals working for both pipelines and producers. He was, however, able to state that all individuals who worked for pipelines and producers with whom he was associated had a common interpretation of ARCs, and he believed that people in the industry generally shared this same view. Such testimony is precisely what is needed

to demonstrate a trade usage, rather than evidence of specific intent. Protestors also attack Mr. Earnest because he was not familiar with the documentation located in Producer and Northern's files. This argument is of no weight since the testimony he offered was used to show a "regularity of observance" from his personal knowledge. Consequently, investigating particular files was not necessary to establish the trade usage. Protestors asserted an assortment of other unproven arguments in an attempt to impeach Mr. Earnest. Mr. Earnest's experience and knowledge based on his dealings in the gas industry for over forty years, however, were certainly ample to qualify him as an expert, and all such arguments are found to be unsupported.

Fourth, Protestors claim that the testimony of more witnesses was necessary to prove usage of trade. (PUCs Br. at 448-449) The evidence offered by Mr. Earnest, fifty-seven producer witnesses, Northern witnesses, statements of the INGAA and of producers in Order No. 23, however, is certainly sufficient to substantiate an assertion of a general understanding as to ARC meaning. It was only necessary to prove that a "regularity of observance" regarding the intent of ARCs. It is not necessary to introduce the testimony of all pipelines and producers that exist to show a general understanding.

In sum, based on the overwhelming evidence introduced in this proceeding, it is found that a usage of trade existed among natural gas producers and interstate pipelines at the time ARCs were entered into, that the clause would trigger payment of the generally applicable ceiling price established for the gas in question. Although the burden of proof in this case is on the contracting parties, it is interesting to note that

Protestors could not find one witness out of all the producers and interstate pipelines to testify to a contrary meaning. Protestors arguments in rebuttal were disposed of above, and the ones not specifically addressed were considered and found to be without merit.

VIII. Miscellaneous Issues

A. The Peoples' Evidence

The Commission's order remanding this case for hearing was based on evidence that Peoples Natural Gas Company (Peoples), formerly a subsidiary, along with Northern, of InterNorth, Inc., had alleged that it was not obligated to pay NGPA ceiling prices pursuant to the ARCs in its intrastate gas purchase contracts. Peoples adopted this position in U.S. District Court declaratory judgment actions with McCoy Petroleum Company (McCoy) and Gear Petroleum Company (Gear). (P-R-48, 50, 51) Throughout this proceeding. Protestors have argued that Northern never intended to pay NGPA ceiling prices because its intent was the same as that which Peoples alleged in Federal Court. In order to determine whether Protestors have successfully refuted the Parties' claimed intent, the following two issues must be explored: 1) What actually was Peoples' intent when it entered gas purchase contracts containing ARCs?; and 2) Can Peoples' intent be imputed to Northern?

1. Peoples' Intent

In the order issued December 12, 1985, the Commission ruled that the Peoples evidence "can be attributed to Northern because of common control . . .", and therefore, sufficient evidence had been introduced to rebutt the presumption in favor of the contracting parties'

stated intent. 33 FERC ¶ 61,355, at p. 61,706. The Commission, however, did not determine that the Peoples evidence reflected Northern's intent or that it even proved Peoples' intent, although Protestors seem not to recognize that.

At the hearing, Protestors, including Peoples, failed to present any additional evidence of Peoples' intent. Northern, however, sponsored the testimony of four witnesses who had worked for Peoples, Mr. Stanley Jervis, Mr. E. J. Holm, Mr. Merlin Remmenga and Mr. T. N. Wright, as well as that of Mr. John McCoy, Managing Partner of McCoy Petroleum Company. Mr. Wright has died between the time his testimony was filed and the hearing. That testimony, however, was originally presented at the "threshold" hearing in 1983 and Protestors declined the opportunity to cross-examine. The testimony is received in this case, but its weight is considered to be minor. In addition, Texaco, Inc. sponsored the testimony of Mr. Steven Baker, who negotiated gas purchase contracts with Peoples, when it was an InterNorth subsidiary.

Based on the record developed herein, there has been no showing that the position Peoples took in the *McCoy* and *Gear* cases was anything more than an unproven contention. The testimony submitted here, in fact, indicates that the more likely intent of Peoples was to pay interstate ceiling rates under ARCs.

Significantly, Mr. Holm, who was a gas buyer for Peoples from 1976 to 1978, has admitted that based on his intent in negotiating for Peoples, NGPA prices were to be paid under ARCs in its contracts. (NNG-R-21 at 12) Mr. Holm further explained that Producers

insisted that gas prices not fall below interstate rates, and that ARCs were used so that these rates could be maintained. (NNG-R-9 at 4) In addition, Mr. Jervis, who held various positions for Peoples, (including President from 1977-1980, also explained that ARCs were utilized to keep prices at the interstate rate or greater. (NNG-R-15 at 9) Mr. Jervis stated also that the intent under ARCs was the same regardless of the authority which established the interstate ceiling rate. (*Id.* at 9-10) The producer witnesses, Mr. McCoy and Mr. Baker, testified that they always believed the ARCs entitled them to the interstate ceiling price, if that rate exceeded the fixed prices in their contracts with Peoples. (NNG-R-18 at 2; TEX-R-6 at 9)

The evidence introduced at this proceeding shows that Peoples was temporizing when it formulated its position in the *McCoy* and *Gear* cases. The Company's concerns centered on the legal uncertainty regarding whether they would be allowed to pass through payments of NGPA prices by the Kansas Corporation Commission and the resulting economic effect if passthrough were denied. (NNG-R-15 at 4, 6-7; TEX-R-6 at 11) This legal uncertainty was caused by the unknown impact of enactment of both the NGPA and the Kansas Gas Price Protection Act. (NNG-R-15 at 6-7) When Mr. Wright advised in a memorandum that Peoples' interim position should be that NGPA rates should not be paid, he in fact noted this legal uncertainty. (P-R-11 at 1, 7; *See, e.g.* NNG-R-16 at 1. TEX-R-7) Mr. Baker also agreed that Peoples' position was based on economic factors. Therefore, regulatory concerns and potential economic consequences, rather than intent were the deciding factors in the Company's initial position regarding payment of

NGPA rates. Peoples was ultimately justified in having such reservations since the Kansas Commission denied passthrough on two occasions.

Peoples was also concerned with the interrelation of ARCs and Favored Nations Clauses that were in some agreements. These clauses provide for automatic increases in gas purchase prices if the rates under other gas purchase contracts are increased. If Peoples paid NGPA prices pursuant to ARCs, it believed it might be obligated to pay equal rates under Favored Nations Clauses. (*See* NNG-R-15 at 3; P-R-46; Tr. 1537-1538)

Protestors try to transform the issue of intent into an issue of truthfulness. They contend that since the allegations by Peoples in the *McCoy* and *Gear* cases were true, that Peoples intent has been proven. As with any alleged fact, however, the focus must be on whether the evidence substantiates the allegation, and not on bona fides of the pleader. Although Peoples may have in good faith alleged an intent contrary to that of Northern, it was never proven, and was certainly not established here. The inquiry in this case must be centered on the weighing of evidence, and not on honesty.

In sum, an ultimate finding of Peoples' intent cannot be made here, nor is such a finding necessary to the outcome of this proceeding. Based on the evidence submitted, however, it seems likely that Peoples did intend to pay NGPA rates under ARCs. Indeed, although Protestors claim that Peoples' payment of NGPA Section 104 prices was part of a settlement (PUCs Br. at 341), the record shows that Peoples regularly paid both Section 104 and 106 prices once these rates exceeded the fixed prices in its gas purchase contracts. (NNG-R-21 at 5;

TEX-R-6 at 10-12; Tr. 3784) Furthermore, Protestors once again disingenuously assert that the Parties did not prove their case because certain evidence was not introduced to refute the Peoples argument. If the Protestors sought to elicit particular testimony, however, they were under an obligation to present such witnesses in an affirmative case, or ask appropriate questions during cross-examination, rather than base their argument on mere conjecture. The Parties may conduct their case by whatever method they believe is most effective to meet their burden of proof. Protestors' arguments in this regard are misplaced in this proceeding.

2. The Effect of Peoples' Intent on Northern

Although the Commission stated that Peoples' statements "can be attributed to Northern," there was no finding that People actually spoke for Northern. The Commission only found that the proffered evidence was sufficient to clear the initial, slightly burden some hurdle, and therefore "burst the presumption bubble" in favor of the Parties' intent.

It must be noted again that the successor to Peoples is a protestor in this proceeding, yet has not submitted testimony of any Peoples' witnesses or any documentation to support the Protestors' case. Certainly, if Northern and Peoples spoke as one, there should have been at least some evidence in the Company's file regarding such affiliation. Northern and Producers, to the contrary, did submit sufficient evidence to prove that the two entities functioned separately and in different regulatory environments. Consequently, even Protestors had shown that Peoples' never intended to pay NGPA rates, it would have no bearing on the outcome of this proceeding.

The evidence indicates that Northern and Peoples operated their companies independently. In particular, their gas acquisition functions were not at all interrelated. Each entity employed its own staff to negotiate gas purchase contracts and arrange supply matters. (NNG-R-8 at 3-4; NNG-R-4 at 4; NNC-R-7 at 3-4; NNG-R-13 at 4; NNG-R-14 at NNG-R-5; NNG-R-2 at 5; NNG-R-11 at NNG-R-10 at 3; NNG-R-12 at 2). Peoples' gas buyers included Mr. Jervis, Mr. Reneau, M. Holm and Mr. Mark Hays, none of whom were associated with Northern's buying activities. Peoples also had its own Manager of Gas Supply, Vice President of Supply and, as was mentioned earlier, Peoples had its own President Mr. Stanley Jervis. Mr. McCarthy explained his testimony that the two companies operate as if they were unaffiliated entities. (NNG-R-at 6-7) Furthermore, Mr. Dienstbier stated that Peoples' decisions only affected its own entity and in no way controlled Northern operations. (NNG-R-14 at 4) Mr. Wright's testimony was consistent with this view. He additionally noted that the two entities had entirely separate locations, Peoples operating in Iowa and Northern in Nebraska. (NNC-R-20 at 1-2)

The Producers who contracted with Peoples also understood that the two gas pipeline entities were not the same. Mr. McCoy testified that when selling gas to Peoples, hiis company only had contact with Peoples' personnel. (Tr. 1767-1768) Also, Peoples previously informed Mr. Baker of Texaco, that it was a separate entity from Northern, and that each company negotiated independently of the other. (TEX-R-13 at 1)

Additionally, it was shown that Peoples and Northern conducted business in different regulatory environments,

and therefore formulated their policies on payment of NGPA rates based on entirely different considerations. Peoples, an LDC, was under state regulation, while Northern, an interstate pipeline, was and is regulated by the FPC/FERC. As was shown *supra*, Peoples was primarily concerned with whether the Kansas Commission would allow payment of NGPA prices to be passed through to its customers. Northern, however, focused on its intent when deciding to pay NGPA ceiling prices. Also, the companies' independence is evident from their decision making processes. Peoples, *after* enactment of the NGPA, decided among its own personnel that it should not initially pay NGPA prices. Northern, however, *prior* to enactment of the NGPA, determined that it should pay such rates, and has consistently maintained that this obligation exists under its ARCs. Not once did the two entities consider the actions or views of the other, nor did they even look to similar criteria when analyzing the issue.

Protestors claim that the two entities actually functioned as one. They first try to support this theory by pointing to evidence that all of InterNorth's subsidiaries were organized into the Natural Gas Group, of which both Peoples and Northern were members. (PUCs Br. at 347-349) Mr. Severa was the President of the Natural Gas Group and responsible for the natural gas functions of InterNorth. (Tr. 2370) Protestors claim, based upon their view of corporations in general, that since Mr. Severa made decisions affecting both companies, they were affiliated such that they functioned as one entity. The evidence shows, though, that the companies' gas supply decisions were made separately. Furthermore, Mr. Severa agreed with Northern's decision

to pay NGPA rates (Tr. 2371-2372, 2283-2286), and allowed Peoples to make a decision on its own contracts. The Natural Gas Group never met to vote on decisions to be made by the subsidiary companies, but rather was established primarily to serve as a forum for the companies to exchange views. (Tr. 2369, 2383-2384)

Second, Staff asserts that because Northern and Peoples generally pursued the same objectives, there was a cross-over of decision making between the companiess. (Staff Br. at 85-90) Merely because both entities were faced with resolving the same issues, however, does not prove that they functioned as one company. It was obviously not uncommon for most intrastate and interstate pipelines to be concerned with the impact of enactment of the NGPA on their companies.

Third, PUCs stress that Northern's Law Department represented both Peoples and Northern. (PUCs Br. at 350) Although the Law Department did offer their services to both companies in certain operations areas, the record unarguably shows that as to ARC intent the decision making processes were separate. Mr. McCarthy and Mr. Wright advised Northern and Peoples, respectively, and each offered different conclusions, based on a separate set of facts and criteria. Mr. McCarthy advised that NGPA rates should be paid, while Mr. Wright recommended that Peoples should not initially pay such prices. Furthermore, Protestors mention that Mr. Madigan, an attorney in Northern's Law Department, advised both companies on contract issues. The record does indicate that Mr. Madigan worked with each entity at various times. An overlap of decision making is not substantiated, however, merely by showing that one attorney advised two clients.

Finally, PUCs argue that whether or not the companies are affiliated is irrelevant, since ARCs were intended to have a uniform meaning. (PUCs Br. at 339) This is an absurd contention and fails to consider the separate environments in which intrastate and interstate pipelines function. Although, as it was found *supra*, ARCs had a uniform meaning among interstate pipelines and producers, no such assertion was made or proven in regard to intrastate pipelines. The evidence overwhelmingly shows that Northern intended to pay NGP Aceiling prices under ARCs. As to intrastate pipelines, however, no such showing was made, nor would it have been relevant here. We are concerned here with Northern's intent only, and that was conclusively proven in this proceeding.

In sum, Northern and Peoples operated as separate companies. The two entities had independent structures and had an overlap of management as would be expected for any common subsidiaries. There was no indication of a commonality of actions or policy between Northern and Peoples.

Even if it had not been proven, there is absolutely no evidence to demonstrate that in a conflict of views, those of the Peoples division would prevail over those those of its much larger corporate brother.

B. NGPA Section 104 and 106 Rates

On September 22, 1982, the Commission issued an order pursuant to a certified question in this case, explaining that NGPA Section 104 and 106(a) rates were in issue here. 20 FERC ¶ 61,329. In light of the findings made herein, that the Parties intended all applicable

NGPA rates to be paid pursuant to ARCs, Section 104 and 106(a) prices were triggered in the contracts at issue between Northern and Producers, and no separate consideration of those rates is necessary.

Conclusion

Northern Natural Gas Company and its Producers, as representatives of all its producers, have conclusively shown that, at the time they entered into contract containing area rate clauses, they intended the clause to trigger payment of all generally-applicable ceiling prices established by federal authority. Protestors arguments to the contrary are who unsupported by the record and have been convincingly refuted by the contracting parties.

Order

Wherefore, it is ordered, subject to the Commission's Rules of Practice and Procedure, that the protests in this proceeding are dismissed and that the proceeding is terminated.

(5)

No. 91-798

In the Supreme Court of the United States

OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, ET AL.,
PETITIONERS

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL ENERGY REGULATORY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly upheld a decision of the Federal Energy Regulatory Commission that the "area rate clause" in certain pre-1978 natural gas sales contracts entitled the natural gas producer to receive payment based on price ceilings that Congress subsequently established under the Natural Gas Policy Act of 1978, 15 U.S.C. 3301 *et seq.*

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-22a) is reported at 934 F.2d 346. Its opinion denying rehearing (Pet. App. 3a-5a) is reported at 941 F.2d 1233. The opinions of the Federal Energy Regulatory Commission are reported at 48 F.E.R.C. (CCH) ¶ 61,177 (Pet. App. 31a-49a) and 50 F.E.R.C. (CCH) ¶ 61,288 (Pet. App. 23a-30a).

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1991. A petition for rehearing was denied on August 20, 1991. Pet. App. 1a-5a. The petition

for a writ of certiorari was filed on November 18, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case involves the interpretation of "area rate clauses" in approximately 1200 natural gas purchase contracts between natural gas producers and Northern Natural Gas Company (Northern), an interstate pipeline. In general, those contract clauses authorized producers to collect from Northern the maximum regulated price allowed by the Federal Power Commission (FPC). The court of appeals upheld the conclusion of the FPC's successor, the Federal Energy Regulatory Commission (FERC), that the area rate clauses, although predating the passage of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. 3301 *et seq.*, allowed the producers to collect the ceiling prices set by Congress in that legislation.

1. Prior to enactment of the NGPA, the FPC regulated natural gas prices pursuant to the Natural Gas Act, 15 U.S.C. 717 *et seq.* (NGA). Under the NGA, natural gas producers could collect from their interstate pipeline customers no more than what the FPC determined to be just and reasonable rates. Producers and their pipeline customers developed a variety of price escalator clauses that allowed the contractual price for the gas to escalate automatically with changes in the FPC-set rates. While the FPC rejected certain types of those contract clauses, it did approve and codify price escalator clauses that tied prices to the maximum "area ceiling rate" set by the FPC. See 18 C.F.R. 154.93(b-1) (originally promulgated by the FPC in Order No. 329, 36 FPC 925 (1966)). Thereafter, when the FPC began set-

ting nation-wide rates rather than area-wide rates, the FPC allowed producers and their pipelines to rely on those rate clauses in their existing contracts to escalate their contract prices to the national rate, notwithstanding the literal "area rate" language contained in the FPC's regulation and the gas contracts. *Pennzoil Co.* v. *FERC*, 645 F.2d 360, 367 (5th Cir. 1981), cert. denied, 454 U.S. 1142 (1982).

When Congress enacted the NGPA, which replaced the FPC-established rates with congressionally established maximum prices, the question arose whether area rate clauses constituted sufficient contractual authority to permit producers to collect the NGPA prices from their pipeline customers. FERC concluded that the NGPA did not preclude reliance on area rate clauses as authority for charging NGPA rates. Order No. 23, [1977-1981] F.E.R.C. Stats. & Regs. (CCH) ¶ 30,040 (1979). In the Commission's view it was not an unreasonable interpretation of the parties' intent to conclude, as a general rule, that such clauses—even those that literally tracked the area rate clause language of the FPC regulation—authorized collection of congressionally set NGPA prices. The Commission went on to explain, however, that resolution of the question whether any particular "area rate clause" constituted sufficient authority to escalate prices to NGPA levels ultimately depended on the contracting parties' intent. *Id.* at 30,315-30,316. In Order No. 23-B, [1977-1981] F.E.R.C. Stats. & Regs. (CCH) ¶ 30,065, on reh'g, *id.* ¶ 30,073 (1979), the Commission established a rebuttable presumption that area rate clauses authorize NGPA prices where the contracting parties represent that to have been their mutual intent. *Id.* at 30,475-30,476. The Commission further provided

that third parties could rebut the presumption with evidence contradicting that stated intent. *Ibid.* The Fifth Circuit affirmed the Order No. 23 presumption and related procedures in all respects pertinent here in *Pennzoil, supra.*

2. In August 1979, Northern filed an evidentiary submission with FERC under the Order No. 23 regulations, stating that Northern and its producers had mutually intended to authorize payment of the highest applicable regulated rate—including NGPA ceiling rates—in 1200 of their gas purchase contracts. Petitioners and others filed "third party" protests, and an extensive evidentiary hearing followed. A FERC Administrative Law Judge (ALJ) issued an initial decision in which he found that the testimony overwhelmingly established that the parties intended the clauses to trigger payment of NGPA prices. 43 F.E.R.C. (CCH) ¶ 63,015 at 65,150-65,154 (1989); see Pet. App. 14a. In particular, the ALJ found persuasive the witnesses' testimony (1) that the area rate clauses had been designed to track the FPC's own regulations regarding permissible price escalator clauses, and (2) that the parties' intent was to permit Northern to offer producers the highest federally-authorized price for gas so that it could compete with intrastate pipelines—which were not subject to federal price limits—for limited supplies of gas to meet existing commitments to the interstate market. *Id.* at 65,154-65,158.

The Commission affirmed the ALJ's decision. It agreed that at the time Northern and its producers contracted, they intended the area rate clause "to trigger payments of all generally-applicable ceiling prices established by federal authority," including those that would later be established by the NGPA.

Pet. App. 31a-32a. The Commission denied petitioners' request for rehearing. *Id.* at 23a-30a.

3. The court of appeals affirmed the Commission's decision. Pet. App. 6a-22a. The court rejected petitioners' argument that they had satisfactorily rebutted the contracting parties' stated intent through evidence showing that those parties did not specifically know or anticipate, at the time that they entered into the contracts, that the FPC-pricing system would be displaced by the then-unenacted NGPA pricing scheme. *Id.* at 14a-16a. The court stated that the question, instead, was "whether the parties would have intended area rate clauses to authorize payment of NGPA rates if they had anticipated them at the time they negotiated the clauses." *Id.* at 16a. It concluded that the evidence strongly supported the conclusion that the parties would have intended the area rate clauses to have that effect. *Id.* at 16a-22a. Petitioners sought rehearing, arguing that the court had improperly affirmed the FERC decision on a rationale other than that of the agency—*i.e.*, on the parties' "reconstructed" intent rather than their actual, historical intent. The court rejected that argument, concluding that the "intent" standard the court of appeals applied and the one FERC applied were, in reality, the same. *Id.* at 4a-5a.

ARGUMENT

Petitioners contend (Pet. 8-13) that the court of appeals' decision amounts to a "*sua sponte* revision" of FERC's approach to the interpretation of area rate clauses. According to petitioners, FERC's inquiry here was whether, as a matter of historical reality, the parties intended area rate clauses to trigger payment of NGPA ceiling prices at the time they entered into the contracts. See Pet. 4, 9. Petitioners argue that the court of appeals departed improperly from FERC's rationale by reframing the inquiry to be whether the parties would have agreed to include congressionally set prices, as opposed to FPC-set prices, if they had been aware that Congress would so change the regulatory scheme. Pet. 6, 10. There is no merit to that contention.

The core premise of petitioners' argument—that the court of appeals affirmed FERC's decision based on a radically different conception of contractual intent than that applied by FERC itself—is erroneous. FERC, like the court of appeals, viewed the dispositive issue to be whether the parties' intent in agreeing to area rate clauses prior to enactment of the NGPA was broad enough to include agreement to the later-established, congressionally set prices, not whether the parties actually anticipated that Congress would set the prices. The court of appeals did not err in pointing out what is apparent to all: at the time the parties entered into their rate contracts, they could not have anticipated the specific nature of price escalation that would be imposed in the future. Rather than applying a different standard, the court of appeals simply clarified the precise nature of the problem addressed by FERC. There is no reason for this Court to review that assessment.

Neither FERC nor the court of appeals that originally reviewed its Order No. 23 regulations—see *Pennzoil, supra*—articulated a theory of "contractual intent" requiring parties to area rate clauses to establish that they had actually anticipated and formed a specific intent with respect to congressionally-set prices. On the contrary, in affirming the Commission's approach, the Fifth Circuit clearly recognized that the inquiry was one of determining the parties' intent "[i]n light of the changed circumstances brought about by the enactment of the NGPA." 645 F.2d at 389. Indeed, as the court of appeals here correctly pointed out, it is not uncommon—and certainly not legally erroneous—for a court to find a circumstance to be within the "intention of the parties" where the court is, more accurately, finding what the parties would have intended had they considered the precise question at hand. Pet. App. 5a. In short, there is no inconsistency between FERC's and the court of appeals' approach to the "intent" question in this case.*

Petitioners also argue (Pet. 14-20) that the court of appeals' decision is inconsistent with the statement in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947), that "a reviewing court, in dealing with a determination or judgment which an administrative agency

* Ultimately, petitioners' real disagreement appears to lie with the Commission's conclusion in its Order No. 23 rulemaking that, as a general proposition, it is not an unreasonable interpretation of area rate clauses to conclude that they constitute sufficient authority to collect congressionally-set NGPA rates, notwithstanding the specific reference in those clauses to the FPC-set "area rate." That position is no longer open to petitioners, however, because the Commission rejected such a "plain meaning" argument, and the Fifth Circuit affirmed. *Pennzoil*, 645 F.2d at 387-390.

alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." There is no merit to this argument. As the court of appeals explained, "courts themselves commonly use the language of historic intent in situations that are really ones of hypothesized or reconstructed intent," and it "is hardly a violation of *Chenery* for a reviewing court to infer that the agency's usage was, similarly, a kind of shorthand." Pet. App. 5a, citing *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281 (1974).

Finally, petitioners' suggestion that the court of appeals conferred a windfall on the contracting parties by imposing prices in excess of the market price and in excess of prices actually paid by Northern (Pet. 7, 17-18) is incorrect. FERC's orders, as upheld by the court of appeals, simply determined that the area rate clauses, when read in isolation, authorize collection of the NGPA ceiling prices. They did not determine, however, the precise price payable by Northern under its supply contracts; nor do they require Northern now to increase its payments above the level it has been paying since the market price dropped substantially below the ceiling prices. As the court of appeals correctly pointed out (Pet. App. 21a), the analysis in this case regarding the impact of area rate clauses does not affect any price reduction claims that may be resolved through negotiation or litigation between the parties under other contract clauses or contract doctrines. See *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distribution Cos.*, 111 S. Ct. 615, 624 (1991) (not only are the NGPA-authorized ceiling prices "squarely within the 'zone of reasonableness' mandated by the NGA,"

but also FERC has established procedures for parties to negotiate reduced prices).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 91-798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PRODUCER INTERVENORS IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the District of Columbia Circuit properly sustained the factual findings of the Federal Energy Regulatory Commission (the "FERC" or "Commission") based upon the proper application of state contract law.

PARTIES TO THE PROCEEDING

To supplement and correct the list of parties provided in the Petition, and in compliance with this Court's Rule 29.1, Producer-intervenors submit a complete list of their publicly traded companies, parent companies, and subsidiaries that are not wholly owned subsidiaries, in the Appendix attached hereto.

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TABLE OF AUTHORITIES

CASES

ADMINISTRATIVE DECISIONS AND ORDERS

* These opinions are reproduced in the Appendix to the Petition For Writ of Certiorari. Citations with an "a" refer to that Appendix.

TABLE OF AUTHORITIES—Continued

IN THE

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OCTOBER TERM, 1991

No. 91-798

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Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF PRODUCER INTERVENORS IN OPPOSITION

INTRODUCTION

This case is a paradigm for the denial of certiorari. The controversy involves no conflict among the Circuit Courts of Appeals, raises no constitutional issues, and involves no issue that will affect the future administration of a statute. Denial of the writ, therefore, is fully warranted.

The natural gas ceiling price controls upon which the controversy below was predicated have largely expired and will lapse in their entirety within the year. Indeed, this is the last third-party protest case that was before the FERC; the forty similar cases, all of which were initiated in 1979, have long since been finally adjudicated.

The challenged decision of the U.S. Court of Appeals for the D.C. Circuit ("Court of Appeals") is not in conflict with the decisions of any other circuit. The contested decision is wholly consistent with the prior decisions of the U.S. Court of Appeals for the Fifth Circuit ("Fifth Circuit"), which has held that state contract law principles govern the construction of the price clauses at issue. Those principles do not enshrine any concept of "historic" intent as defined by Petitioners, but rather require courts to construe contracts based upon the parties' intent as revealed by the language of the contract, the commercial context, any relevant course of performance, and the usage of trade. *See Pennzoil Co. v. FERC*, 645 F.2d 360, 383-84 (5th Cir. 1981) (*"Pennzoil I"*), *cert. denied*, 454 U.S. 1142 (1982); *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1140 (5th Cir. 1986) (*"Pennzoil II"*).

The case does not involve any substantial federal question. In affirming the orders of the FERC, the Court of Appeals did not, as Petitioners urge, *sua sponte* change the adjudicative standards from that employed by the agency below. The Court of Appeals merely provided further explication of the common law principles applicable to contract construction in the circumstances presented.

Finally, the Court of Appeals properly deferred to the FERC's factual findings and credibility determinations, which were based upon the testimony of over 70 witnesses (none of whom were sponsored by Petitioners) and over 5000 pages of trial transcript.

REASONS FOR DENYING THE WRIT

I. PETITIONERS RAISE NO ISSUES OF CONSTITUTIONAL SIGNIFICANCE OR PUBLIC IMPORTANCE.

This Court providentially reserves its judicial resources for cases that present issues of constitutional significance or involve matters of overarching importance to the public. In the present case, Petitioners have raised no issues of legal significance or public importance warranting the Court's review of the Court of Appeals' decision.

Although Petitioners strain to suggest constitutional overtones, their efforts fail. Petitioners' allegations relate solely to the administration of an eleven year old order issued by the FERC as part of its implementation of Title I of the Natural Gas Policy Act of 1978 ("NGPA"), 15 U.S.C. §§ 3311-3333. In Order No. 23, the FERC established procedures to resolve controversies concerning whether "area rate clauses" authorize collection of the maximum lawful ceiling prices set forth in Title I of the NGPA.[1]

In addition to prescribing ceiling prices, Title I of the NGPA also provided a framework within which ceiling prices would be eliminated gradually for sales of most supplies of natural gas.[2] In 1989, Congress enacted the

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[1] Order No. 23, F.E.R.C. Stats. & Regs. [Regs. Preambles 1977-1981] (CCH) ¶ 30,040 (March 20, 1979). "Area rate clauses" were one of three types of indefinite price escalator clauses permitted to be included in contracts subject to the Commission's jurisdiction under the Natural Gas Act of 1938 ("NGA"), 15 U.S.C. §§ 717-717w. *See* 18 C.F.R. § 153.94(b-1). They are so named because the Commission originally established producer ceiling prices by defined geographic areas. *See Permian Basin Area Rate Cases*, 390 U.S. 747 (1960). When Congress withdrew the Commission's delegated authority to establish ceiling prices and set ceiling prices by statute, questions arose about whether area rate clauses could be sufficient contractual authority to authorize the payment and collection of NGPA prices.

[2] Section 121(a)-(c) of the NGPA sets forth the schedule pursuant to which the sales of over sixty percent of the supplies of natural

Natural Gas Wellhead Decontrol Act, which provides that all residual wellhead price controls will expire no later than January 1, 1993.[3] Inasmuch as Order No. 23 relates exclusively to whether collection of regulated ceiling prices is contractually authorized, that Order has applicability only to the extent that regulated ceiling prices remain in existence. Since all regulated ceiling prices will expire January 1, 1993, Order No. 23 will have no future applicability after that date.[4] Accordingly, the guidance of this Court on the question presented will not contribute to the future administration of a federal statute, nor will it have applicability beyond the limited regulatory issues involved.

There are no cases pending in lower courts that will turn on the resolution of the specific issues involved in this case. The FERC has long since decided every third-party protest case involving area rate clause construction under the standards of Order No. 23, and there are no cases pending in the courts of appeals that involve the application of Order No. 23 principles.

Finally, this case involves no issues of broad public importance. Rather, it is narrowly focused upon discrete matters of contract construction and interpretation involving case-specific facts and credibility determinations.[5]

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gas became price deregulated. 15 U.S.C. § 3331(a)-(c). *See FERC v. Martin Exploration Management Co.*, 486 U.S. 204 (1988); *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd.*, 474 U.S. 409 (1986); *Public Serv. Comm'n v. Mid-Louisiana Gas Co.*, 463 U.S. 319 (1983).

[3] Pub. L. No. 101-60, 103 Stat. 157 (codified at 15 U.S.C. § 3331(f)).

[4] The Fifth Circuit has held that the FERC lacks jurisdiction to construe the terms of contracts that relate to natural gas removed from its NGA jurisdiction. *See Pennzoil I*, 645 F.2d at 380-82.

[5] *See Texas v. Mead*, 465 U.S. 1041, 1043 (1984) (Stevens, J.) (the Court does not "grant a certiorari to review evidence and discuss specific facts."). Petitioners' implication that the Court of

The question presented by Petitioners, therefore, is unworthy of review.

II. THE COURT OF APPEALS APPLIED THE PROPER LEGAL STANDARDS.

Petitioners allege that the Court of Appeals violated the *Chenery*[6] doctrine by deciding the case under a legal standard different from that adopted by the agency and endorsed by reviewing courts. Specifically, Petitioners allege that the Court of Appeals adopted a "gap filling" theory of contract construction, while the agency and other courts purportedly have held that Order No. 23 cases must be resolved solely on the basis of "historic" intent.

Petitioners' position is predicated upon a definition of "historic" intent that finds no support in the law of this case or in general principles of contract law. Petitioners claim that "historic" intent means that contracting parties must have specifically contemplated the possibility that Congress would establish ceiling prices by statute, and have formed a specific intent with respect to that contingency, as the *sine qua non* of proving an entitlement to collect NGPA rates pursuant to area rate clauses.[7] However, neither Order No. 23 nor any judicial precedent

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Appeals' decision somehow imposes a higher price to be paid by customers (*see* Petition at 17), is simply false. The Court of Appeals' decision simply effectuates the mutual agreement of the parties as to what their contracts mean, and thereby affirmed the lawfulness of the price paid. That decision does not, in any manner, impair the contracting parties' ability to amend or to modify their contracts to provide for lower prices. *See generally Mobil Oil Exploration & Producing Southeast, Inc. v. United Distribution Cos.*, 111 S. Ct. 615 (1991).

[6] *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

[7] *See, e.g.*, Petition at 3. Petitioners claim that Order No. 23 provided that area rate clauses would be construed as authorizing collection of NGPA rates if the parties "intended, *at the time of contracting* for their area rate clauses, to provide for Congressionally-set prices." (emphasis in original).

requires the degree of prescience urged by Petitioners. Accordingly, Petitioners' claims are without merit.

A. Order No. 23.

In Order No. 23, the FERC found that nearly all parties to interstate natural gas contracts intended that area rate clauses would authorize the payment and collection of ceiling prices generally, and that they did not intend to restrict the authority of those clauses to prices prescribed by any specific governmental authority.[8] The FERC held that there was no basis in law or regulation to bar effectuation of this generalized intent simply because the nature of the rate setting authority had reverted from the Commission back to Congress.[9] Accordingly, the FERC concluded that, as a matter of contract construction, area rate clauses should be construed as authorizing collection of NGPA rates where the parties mutually averred an intent to authorize payment and collection of the highest price allowed by governmental authority.[10]

B. Fifth Circuit Precedent.

In *Pennzoil I*, the Fifth Circuit affirmed the FERC's use of general contract law to find area rate clauses sufficient contractual authority to collect NGPA prices,[11] but

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[8] Order No. 23, F.E.R.C. Stats. & Regs. at 30,312-313. ("Most sellers of natural gas in the interstate market have taken the view that the intent of parties in agreeing to an area rate clause was to permit escalation to the highest ceiling price permitted by law. Most interstate pipeline purchasers have endorsed this position.").

[9] *Id.* at 30,314.

[10] *Id.*

[11] The Fifth Circuit held that the "FERC reasonably concluded from the contract language and its regulatory and commercial context that it was not unreasonable for the parties to have meant to contract for whatever regulated rate was available, and not necessarily to have intended to limit the *source* of those celings." *Pennzoil I*, 645 F.2d at 389 (emphasis in original).

held that "specific determinations of contractual authority in the protest procedures must take account of and follow any differences with general contract law that the appropriate state contract law may have." [12]

The Fifth Circuit noted the state law axiom that, in construing a contract, courts must give effect to the parties' intent. But the Fifth Circuit left no doubt that substantially more was involved than ascertaining the subjective intent of the parties. Rather, the obligation upon the adjudicative authority is to construe the agreement "by considering the instrument itself, its purposes, and the circumstances of its execution and performance." [13] The Fifth Circuit explicitly recognized that an extrapolation of a general intent—an intent to collect the highest price allowed by law—to an intervening specific circumstance—promulgation of NGPA ceiling prices—would be required:

> Ambiguity easily arises when the contract is applied to its subject matter in changed circumstances. Area rate clauses are certainly ambiguous as applied to the collection of currently available ceiling rates for natural gas. *A contract should be interpreted in light of the changed circumstances to accomplish what the parties intended.*[14]

Thus, the Fifth Circuit concluded that "it was reasonable for FERC to provide for the opportunity to interpret area rate and variant escalation clauses to accom-

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[12] *Id.* at 383-84. *See also id.* at 387 ("the appropriate contract law to apply is the law that would govern the parties' dealings were there no regulation at all of the contract's subject matter.") The Fifth Circuit further noted, however, that because nearly all states have adopted the Uniform Commercial Code, the obligation to follow state contract law would not place an unreasonable burden on the FERC.

[13] *Id.* at 388.

[14] *Id.* (emphasis added).

plish what the parties intended rather than to categorically interpret them literally to the defeat of this intent." [15]

In *Pennzoil II*, the Fifth Circuit reiterated that the ultimate issue in an Order No. 23 protest is contract construction in its broadest sense:

> [T]he central purpose of the hearing before the presiding ALJ is to determine the factual question of intent. Intent, however, is relevant only as it relates to the proper interpretation of the contracts. Once the presumption disappears, the Commission is obligated to construe the contracts to determine whether they authorize NGPA rates or not, taking into account the language of the contracts and *all* the extrinsic evidence of intent presented, including the parties' assertion of mutual intent.[16]

C. Agency Action.

At the hearing of this case before the Administrative Law Judge ("ALJ"), Northern Natural Gas Company and its producer-sellers introduced evidence confirming that their intent under area rate clauses was to authorize the payment and collection of the highest price allowed by law. The ALJ found the testimony of the contracting parties' 70 witnesses credible.[17] Additionally, the ALJ found that the other extrinsic evidence offered by the contracting parties corroborated the testimony of their intent and independently demonstrated that the

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[15] *Id.* at 389-90.

[16] *Pennzoil II*, 789 F.2d at 1141 (emphasis in original). The Fifth Circuit further noted that: '"In interpreting an ambiguous contract, a court does not simply determine the parties' intent; it makes a legal conclusion about the meaning of the contract based on evidence of the parties' intent."' (*quoting Carpenters Amended and Restated Health Ben. Fund v. Holleman Constr. Co.*, 751 F.2d 763, 767 n.7 (5th Cir. 1985)).

[17] *Northern Natural Gas Co.*, Initial Decision, 43 F.E.R.C. (CCH) ¶ 63,015 at 65,150-154 (1988).

area rate clauses at issue should be construed to authorize collection of NGPA rates.[18]

The ALJ expressly rejected Petitioners' claim that contracting parties were required to prove that they specifically foresaw and adopted a specific intent with respect to ceiling prices prescribed by Congress in the NGPA. The ALJ noted that "the Fifth Circuit found an intent to pay NGPA ceiling prices was sufficiently described as one that would 'permit escalation to the highest ceiling price permitted by governmental authority.' " [19] The ALJ further observed that the Court of Appeals had found it sufficiently clear to describe an intent to pay NGPA ceiling prices as one that would " 'allow the contract prices to float to the highest relevant ceiling set by regulatory authorities . . . .' " [20]

The FERC affirmed the findings of the ALJ, specifically including his credibility determinations and his application of state law principles to the evidence before him.[21]

D. Challenged Decision.

In its opinion, the Court of Appeals fully accepted the proposition that the ultimate objective in the administrative proceeding was to construe the contracts according

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[18] *Id.* at 65,158-166. The ALJ found that the parties had introduced evidence showing the commercial context, a course of performance, and a usage of trade.

[19] *Id.* at 65,153 (citation omitted).

[20] *Id.* (*quoting Associated Gas Distributors v. FERC*, 810 F.2d 226, 229 (D.C. Cir. 1987)). Petitioners' claim that the Court of Appeals had previously endorsed their defintion of "historic" intent is false. In *Associated Gas Distributors v. FERC*, the Court of Appeals dealt exclusively with the summary dismissal of third-party protests.

[21] *Northern Natural Gas Co.*, Order Affirming Initial Decision, 48 F.E.R.C. ¶ 61,177 (1989), *reh'g denied*, 50 F.E.R.C. ¶ 61,288 (1990).

to state contract law principles.[22] The Court of Appeals held that the FERC had properly applied state contract law, and further concluded that substantial evidence supported the FERC's findings of fact.

The Court of Appeals rejected Petitioners' claim that the "sole inquiry is into historical intent."[23] Citing the observations of leading scholars of contract law, the Court of Appeals commented that in cases involving unanticipated changes of circumstances, courts construe and enforce contracts according to what the evidence demonstrates would have been the intent of the parties had they considered the occurrence of the specific event.[24] In this discussion, the Court of Appeals more clearly articulated the nature of a fact finder's inquiry under the circumstances presented, and undoubtedly added to the reservoir of scholarly opinion on this aspect of contract law.[25] It did not, however, announce or apply a new substantive decisional standard.

The Court of Appeals applied essentially the same standard enunciated by the Fifth Circuit in *Pennzoil I*

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[22] *See South Dakota Pub. Util. Comm'n v. FERC*, 934 F.2d 346, 350 (D.C. Cir. 1991) (Appendix at 16a).

[23] *Id.*

[24] *Id.*

[25] *See generally* E. Farnsworth, *Contracts* § 7.16 at 520-23 & n.12 (1982) (discussing "gap filling" process); Restatement (Second) of Contracts § 204 (1981) ("[w]hen the parties to a bargain . . . have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court"); Note, *Conflict of Laws—Contracts*, 47 La. L. Rev. 1181, 1184-86 (1987) (discussing "gap filling" measures governing contract interpretation and construction); D'Amato, *Legal Uncertainty*, 71 Cal. L. Rev. 1, 41 (1983) (discussing jurisprudential approaches to contract construction and interpretation); Note, *Oil and Gas—Obligations—The Meaning of "Market Value" In a Gas Lease Royalty Clause*, 57 Tul. L. Rev. 1049 (1983); Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 Cornell L. Rev. 785, 799 (1982).

and *Pennzoil II*. The Court of Appeals agreed with the FERC that the parties had introduced overwhelming factual evidence supporting the conclusion that the area rate clauses in their contracts should be construed as authorizing NGPA prices. Whether the Court of Appeals viewed the inquiry as applying a generalized intent to a specific event, or hypothesizing actual intent with respect to an intervening event based upon other evidence of intent, is a distinction without a difference.[26]

Even if the erroneous argument that a change in the description of the inquiry is a change in the adjudicatory standard had any validity, the Court of Appeals committed no error. The *Chenery* doctrine is aimed at assuring that initial administrative determinations are made with relevant criteria in mind and in a proper procedural manner.[27] Here, the Court of Appeals concluded that the FERC indeed had considered the relevant criteria and that the agency came to the conclusion to which it was bound to come as a matter of law.[28]

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[26] In its opinion accompanying the denial of rehearing, the Court of Appeals noted that courts frequently use the language of historic intent where the actual analysis actually involves hypothesized or reconstructed intent. *South Dakota Pub. Util. Comm'n v. FERC*, 941 F.2d 1233, 1234 (D.C. Cir. 1991) (Appendix at 5a). To the extent that the Court of Appeals quibbled with the nomenclature used either by the FERC or the Fifth Circuit, the focus of the Court of Appeals' comments was upon the description of the inquiry as opposed to the nature of the ultimate legal issue.

[27] *Massachusetts Trustees of Eastern Gas and Fuel Assocs. v. United States*, 377 U.S. 235, 247 (1964).

[28] *See SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (citing the settled rule that lower court decision must be affirmed if the result is correct although the lower court relied upon the wrong ground or gave a wrong reason). *See also United Video, Inc. v. FCC*, 890 F.2d 1173, 1189-90 (D.C. Cir. 1989) ("*Chenery* reversal is not necessary where, as here, the agency has come to a conclusion to which it was bound to come as a matter of law, albeit for the wrong reason, and where, as here, the agency's incorrect reasoning was

III. PETITIONERS' REMAINING CLAIMS ARE FRIVOLOUS.

A. The Court of Appeals Properly Deferred to the Factual Finding of the Agency.

Petitioners inaccurately assert that the Court of Appeals made "its own fact-finding under its newly devised standard." [29] The Court of Appeals did not undertake any new fact-finding in this case. Rather, the Court of Appeals reviewed the administrative record and determined that the evidence was overwhelmingly sufficient to affirm the FERC's decision. Far from invading the province of the administrative agency, the Court of Appeals was faithful to its statutory obligation to give conclusive effect to the FERC's findings of fact where they are supported by substantial evidence.[30]

B. The Court of Appeals Fully Respected Petitioners' Due Process Rights.

As a corollary to their claim that the Court of Appeals adopted a new substantive standard, Petitioners assert that the Court of Appeals violated their constitutional rights to notice and due process. This claim is baseless.

Order No. 23 and the Fifth Circuit's *Pennzoil* decisions put Petitioners on notice that the ultimate issue in the case was one of contract construction, and that state contract law principles would supply the adjudicative standard. Petitioners had ample, if not excessive, opportunity to present evidence on the issue at bar. Petitioners simply failed to do so and it is time to draw the curtain

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confined to that discrete question of law and played no part in its discretionary determination.").

[29] *See* Petition at 6.

[30] *See* 15 U.S.C. § 717r(b) ("The findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive."); 15 U.S.C. § 3416(a)(4) (same).

of finality on this case, which has nearly outlived the statute upon which the controversy is based.

CONCLUSION

The Court of Appeals' opinion clearly indicates that the court addressed the nature of the inquiry into the parties' intent solely to "put[] into proper perspective a number of points raised by petitioners' counsel that assume the sole inquiry is into historical intent."[31] The Court of Appeals neither announced a new standard, altered an existing standard, nor invaded the province of the administrative agency. The Court should therefore deny the Petition for Writ of Certiorari.

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[31] *South Dakota Pub. Util. Comm'n v. FERC*, 934 F.2d at 350 (Appendix at 16a).

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APPENDIX

APPENDIX

A. *Parties*

Petitioners omitted Exxon Corporation from the list of parties appearing below in the Petition for Writ of Certiorari. All other parties appearing below and in this Court are listed in the Petition. The following lists set forth the name of the publicly-owned parents, subsidiaries, and affiliates of the Producer-intervenors joining in this Brief.

American Trading & Producing Corp.

Crown Central Petroleum Corp.

ARCO Oil and Gas Company,
a division of Atlantic Richfield Company

85819 Canada Limited
AA Antilles Coal N V
AAPSS90, Inc.
AAPSS91, Inc.
AAPSS92, Inc.
AAPSS93, Inc.
AAPSS94, Inc.
Agro Internacional, S. De R.L. De C.V.
Alyeska Pipeline Service Company
ARCO Chemical Company
ARCO Solar Nigeria Ltd.
Badger Pipeline Company
Black Lake Pipe Line Company
Blair Athol Coal Pty, Limited
Carbones Del Guasare, S.A.
Colonial Pipeline Company
Compania De Petroleo Ganso Azul, Ltda
Cook Inlet Pipe Line Company
Dalrymple Bay Coal Terminal Pty Ltd.
Dixie Pipeline Company
East Texas Salt Water Disposal Co.
Guasare Coal International N.V.

Iricon Agency Ltd.
Kenai Pipe Line Company
Kuparuk Transportation Capital Corporation
Kuparuk Transportation Company
Lyondell Petrochemical Company
Nordisk Mineselskab A/S
Platte Pipe Line Company
Tecumseh Pipe Line Company
Texas-New Mexico Pipe Line Company

Chevron U.S.A. Inc.

Canyon Reef Carriers, Inc.
Chevron Capital, N.V.
Chevron Capital U.S.A., Inc.
Chevron Corporation
Chevron Investment Management, Inc.
Chevron Oil Finance Company
Felix Oil Company
Gulf Oil Finance, N.V.

CNG Producing Company

CNG Producing Company is a wholly-owned subsidiary of Consolidated Natural Gas Corporation.

EXXON Corporation

Exxon Capital Corporation
Exxon Capital Holdings Corporation
Exxon Capital Ventures, Inc.
Exxon Credit Corporation
Exxon Financial Services Company Limited
Exxon Funding B.V.
Exxon Pipeline Company
Exxon Shipping Company
Exxon Supply Company
Imperial Oil Limited
Interhome Energy, Inc.
Scurry-Rainbow Oil Limited

Grace Petroleum Corporation

W.R. Grace & Co.
Grace Energy Corp.
Del Taco Restaurants, Inc.

Marathon Oil Co.

USX Corporation
Texas Oil and Gas Corp.

Maxus Exploration Company

Maxus Exploration Company (formerly Diamond Shamrock Exploration Company) is a wholly-owned subsidiary of Maxus Energy Corporation, a publicly-owned corporation. The affiliate (not wholly-owned by Maxus Energy Corporation or a wholly-owned subsidiary thereof) of Maxus Exploration Company is Diamond Shamrock Offshore Partners Limited Partnership.

Norfolk Energy Inc.

Norfolk Energy Inc. (formerly Tricentrol United States, Inc.) is a wholly-owned subsidiary of Norfolk Holdings Inc. Norfolk Energy Inc., which has no publicly traded affiliates, explores, produces, and sells oil and gas and other hydrocarbons primarily in the Bear Paw area of Montana.

OXY USA Inc.

OXY USA Inc. is the successor to Cities Service Oil and Gas Corporation and Cities Service Oil Company. OXY USA Inc. is a wholly-owned subsidiary of Occidental Petroleum Corporation, which is a publicly-owned corporation. In addition, OXY USA Inc. is an affiliate of IBP Inc. which is also publicly owned.

Phoenix Resources Company

The Phoenix Resources Companies, Inc.

Texaco Inc.

Texaco Capital Inc.
Texaco Capital N.V.
Texaco International Finance Corp.
Texaco Inc.
Texaco Mexicana S.A. de C.V.
Texaco Togo
Texaco Nigeria Limited
Texaco Ghana Limited
Refineria Texaco de Honduras S.A.

Texas International Petroleum Corp.

The Phoenix Resources Companies, Inc.

The Producer-intervenors joining this Brief primarily are engaged in the exploration for, and development, production, and sale of, natural gas for resale in interstate commerce.

No. 91-798

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

SOUTH DAKOTA PUBLIC UTILITIES COMMISSION, MINNESOTA PUBLIC UTILITIES COMMISSION, and PEOPLES NATURAL GAS COMPANY, a division of UtiliCorp United Inc.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF PRODUCER INTERVENORS TO MOTION FOR LEAVE TO FILE *AMICI* BRIEF

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FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

RESPONSE OF PRODUCER INTERVENORS TO MOTION FOR LEAVE TO FILE *AMICI* BRIEF

Producer Intervenors would bring to the Court's attention three facts material to the Motion of the National Association of Regulatory Utility Commissioners, *et al.* ("NARUC"), for Leave to File Brief as *Amici*.

First, Rule 37.2 of the Supreme Court Rules provides that an *amicus* must seek the written consent of all parties below prior to filing. NARUC states in its brief that the number of parties "has precluded amici from obtaining consent from all Respondents." Motion at 2. Although Producer Intervenors participated in the Court of Appeals through the filing of a joint brief, NARUC did not attempt to secure the consent of the undersigned

counsel, who represented the producers collectively.[1] In fact, undersigned counsel has been unable to identify a single producer contacted by NARUC for consent to file an *amicus* brief.[2]

Second, NARUC has not been significantly involved in the proceedings below or in prior proceedings that were predicated upon the same legal issues. NARUC did not participate in the Order No. 23 rulemaking, the judicial review of Order No. 23, or the administrative proceedings in this case. NARUC first expressed an interest in this matter through the filing of a motion for leave to file an *amicus* brief in support of the suggestion of rehearing at the Court of Appeals, which request was denied.

Finally, NARUC simply parrots the claims and arguments of Petitioners. Because NARUC brings no new perspective to the issues at bar, the Court should deny the request for leave to file as *amici*.

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Dated: February 6, 1992

AND ON BEHALF OF

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[1] Producers filed a joint response in opposition to NARUC's motion for leave to file as *amicus curiae* in the Court of Appeals.

[2] Supreme Court Rule 37.2 provides that a motion for leave to file a brief *amicus curiae* when consent has been refused is not favored.

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